Nov 6. '78. Arg'd W. H. Swayne

8 Otto, 1-169.
Oct. 2, 1878

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~321~~ 62

THE COUNTY OF SCHUYLER, IN THE STATE OF MISSOURI, PLAINTIFF IN ERROR,

vs.

JOSEPH T. THOMAS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED DECEMBER 3, 1875.

Oct. Term 1875 No 321

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, at the September term, 1874, thereof, between Joseph T. Thomas, plaintiff, and the County of Schuyler, in the State of Missouri, defendant, a manifest error hath happened to the great damage of the said County of Schuyler, as by its complaint appears: we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the fourth Monday of October instant, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this ninth day of October, in the year of our Lord one thousand eight hundred and seventy-four.

Issued at office in the city of St Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

AUSTIN DRAKE,
Clerk C. C. U. S., E. Dist. Mo.,
By H. C. GEISBERG, *D. C.*

Allowed by

JOHN F. DILLON,
Judge.

2 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a full and true transcript of the record and proceedings had in the within cause.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court this 1st day of September, 1875.

[SEAL.] M. M. PRICE, *Clerk,*
By C. M. WARD, *Deputy.*

(Indorsed:) United States circuit court, eastern district of Missouri. Joseph T. Thomas, d'f't in error, vs. (# 178.) County of Schuyler, pl'ff in error. Writ of error. To the circuit court of the United States for the eastern district of Missouri. Returned and filed. , 187 . , clerk.

3 In the circuit court of the United States for the eastern district of Missouri.

Be it remembered that heretofore, to wit, on the 22d day of August, 1873, the following petition was filed in said court, which said petition is in words and figures as follows, to wit:

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In the circuit court of the United States for the eastern district of Missouri, September term, A. D. 1873.

JOSEPH T. THOMAS, PLAINTIFF,
vs.
THE COUNTY OF SCHUYLER, IN THE STATE of Missouri, defendant.

The plaintiff says he is a citizen of the State of Pennsylvania; that the defendant is a county of the State of Missouri, duly established and organized in pursuance of the laws of the said State, and is a citizen thereof.

4 The plaintiff further says that by an act of incorporation of the general assembly of the State of Missouri, entitled "An act to incorporate the Alexandria and Bloomfield Railroad Company," approved February 9th, 1857, the Alexandria and Bloomfield Railroad Company was incorporated, and thereafter was duly organized under said act of incorporation.

That the tenth section of the said act of incorporation provides as follows, viz:

"The said company shall in all things be subject to the same restrictions and entitled to all the privileges, rights and immunities which were granted to the North Missouri Railroad Company by an act entitled 'An act to incorporate the North Missouri Railroad Company,' approved March 3d, 1851, so far as the same are applicable to the company hereby created, as fully and completely as if the same were herein re*in*acted."

That the said act of March 3d, 1851, last above mentioned, and
5 the fourteenth section thereof, contains the following provision, viz:

"It shall be lawful for the county court of any county in which any part of the route of said railroad may be to subscribe to the stock of said company, and it may invest its funds in the stock of said company and issue the bonds of such county to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interest and credit of the county."

The plaintiff further states that a part of the route of the said Alexandria and Bloomfield Railroad Company's railroad was within the said county of Schuyler, as the same is defined in the said act incorporating the said company.

The plaintiff further states that in pursuance of an act of the said general assembly, entitled "An act to amend an act entitled 'An act to incorporate the Alexandria and Bloomfield Railroad Company,'" approved February 19th, 1866, authorizing said company to change
6 the incorporate name, also authorizing said company to extend said road from a point at or near Luray, in Clark County, Missouri, to Nebraska City, in Nebraska Territory, by way of or near Rockport, in Atchison County, Missouri; and also authorizing said company to adopt all or any of the sections of this act, the same to be binding on said railroad company, approved February 19th, 1866, the first section of which said act was adopted by the board of directors of the said Alexandria and Bloomfield Railroad Company at a meeting of the said board called for that purpose by the order of a majority of said board, the secretary having given thirty days' previous notice in writing

to each director, stating fully the object of said meeting, the said Alexandria and Bloomfield Railroad Company changed its corporate name to that of the Alexandria and Nebraska City Railroad.

7 The plaintiff further states that, in pursuance and by authority of the general law of the States of Missouri and Iowa, the said Alexandria and Nebraska City Railroad entered into articles of consolidation, and consolidated with the Iowa Southern Railway Company of the State of Iowa, a corporation incorporated and organized under the laws of the said State of Iowa, whereby the said two last-mentioned corporations became and were merged and consolidated into one corporation under the name of the Missouri, Iowa and Nebraska Railway Company, which said articles of consolidation were duly filed with the respective secretaries of State of the said States of Missouri and Iowa.

The plaintiff further says that the said county court of the said county of Schuyler, in the year A. D. 1871, and prior to the 1st day of September of that year, in pursuance of the powers granted in

8 the said act of incorporation incorporating the said Alexandria and Bloomfield Railroad Company, subscribed to the capital stock of the said Missouri, Iowa and Nebraska Railway Company, in the sum of one hundred and fifty thousand dollars, for one thousand five hundred shares of said stock, the same being in shares of one hundred dollars each, and in payment for one thousand dollars of said subscription, being for ten of said shares, the said county court of the said county, in pursuance of the said powers granted as aforesaid, caused the bond of the said county, numbered 102, to be duly executed and issued on the 1st day of September, A. D. 1871, in the sum of one thousand dollars, payable December 31st, A. D. 1891, at the Farmers' Loan and Trust Company in New York, with interest thereon at the rate of eight per cent. per annum, to the said Missouri, Iowa and Nebraska Railway Company or bearer, and on the said 1st day of September, 1871,

9 the said bond was delivered to Moses Baker, treasurer of Schuyler County, under an agreement between the said county court and the said Missouri, Iowa and Nebraska Railway Co., to be by the said Baker held in trust for said railway co. until certain conditions of said subscription were complied with upon part of said railway co., which said bond is in the words and figures following, to wit:

Know all men by these presents, that the County of Schuyler, in the State of Missouri, acknowledges itself indebted to the Missouri, Iowa, and Nebraska Railway Company, "a corporation existing under and by virtue of the laws of the States of Missouri and Iowa, formed by consolidation of the Alexandria and Nebraska City Railroad Company (formerly Alexandria and Bloomfield Railroad Company), of the State of Missouri, and The Iowa Southern Railway Company of the State of Iowa, in the sum of one thousand dollars, which sum the said

10 county hereby promises to pay to the said Missouri, Iowa, and Nebraska Railway Company, or bearer, at the Farmers' Loan and Trust Company, in New York, on the 1st day of September, A. D. 1891, together with interest thereon from the 31st day of December, 1871, at the rate of eight per cent. per annum, which said interest shall be payable annually in the city of New York, on the 31st day of December, in each year, as the same shall become due, on the presentation of the coupons hereto annexed. This bond being issued under and pursuant to orders of the county court of said Schuyler County, for subscription to the stock of the Missouri, Iowa and Nebraska Railway Company, as authorized by an act of the general assembly of the State of

Missouri, entitled "An act to incorporate the Alexandria and Bloomfield Railroad Company," approved February 9th, 1857.

In testimony whereof the said County of Schuyler has executed
11 this bond by the presiding justice of the county court of said county, under the order of said court, signing his name hereto, and the clerk of said court, under the order thereof, attesting the same and affixing thereto the seal of said court. This done at the town of Lancaster, in the county of Schuyler, in the State of Missouri, the first day of September, A. D. 1871.

WILLIAM CASPER,
Presiding Justice of the County Court of Schuyler County, Missouri.

Attest:

SEAL SCHUYLER COUNTY COURT, MISSOURI.	D. T. TRUITT, *Clerk of the County Court of Schuyler County, Missouri.*

Countersigned and delivered this 17 day of May, 1872.
M. BAKER, *Trustee.*

To which said bond were annexed twenty interest coupons, numbered from 1 to 20, inclusive, each in the sum of eighty dollars, being
12 for one year's interest upon the said bond, and each maturing successively one year after the other, and all bearing date September 1st, A. D. 1871.

The plaintiff further says that on the 17th day of May, A. D. 1872, the said bond, so numbered, executed and issued, as aforesaid, was duly delivered to the said Missouri, Iowa and Nebraska Railway Company, together with the said interest coupons annexed thereto as aforesaid, in payment for the said subscription of one thousand dollars for the said ten shares of its capital stock as aforesaid. And afterwards, and before the maturity of any of the said coupons, the said bond, together with the said coupons, were, for value, sold and transferred by delivery to the plaintiff, who is the holder and owner thereof. That by the first maturing of said coupons now detached by the plaintiff from the said bond, being coupon numbered one of the said bond, and bearing
13 date September 1st, 1871, and herewith filed, the said county of Schuyler promised to pay to the bearer thereof, on the 31st day of December, A. D. 1872, at the said Farmers' Loan and Trust Company in New York, the sum of eighty dollars, being one year's interest on said bond, which said coupon was for value (together with the said bond) sold and transferred by delivery to the plaintiff before the maturity thereof, and the plaintiff is now the holder and owner thereof.

And at its maturity the plaintiff caused the same to be duly presented for payment at the said place of payment, and payment thereof to be demanded, but payment thereof was not made. That a part of the year for the year's interest of which the said coupon was executed, to wit, from the 31st day of December, A. D. 1871, to the said 17th day of May, 1872, had passed at the time of delivery as aforesaid of the said bond and coupons to the said railway company, and the said
14, 15, 16 county is for that cause entitled to a rebate upon the said coupon in proportion to the time so passed before such delivery, to wit, in the sum of thirty $\frac{45}{100}$ dollars, leaving a balance of forty-nine $\frac{55}{100}$ dollars due thereon, which said balance the plaintiff says is justly due and owing to him on the said coupon from the defendant, with interest thereon from the said 31st day of December, A. D. 1872, for which said balance and interest the plaintiff asks judgment.

17 2D COUNT.—And for a further and different cause of action the plaintiff says that the said county court of the said county of Schuyler, in the year A. D. 1871, and prior to the first day of September of said year, in pursuance of its powers so to do, as the same are set forth and derived by averments in the first count of this petition, did subscribe to the capital stock of the said Missouri, Iowa and Nebraska Railway Company, which is the same railway company of that name mentioned and described in the said first count, in the sum of one hundred and fifty thousand dollars for one thousand five hundred shares of said stock, the same being in shares of one hundred dollars each; and in payment for one thousand dollars of said subscription, being for ten of said shares, the said county court of said county, in pursuance of its said powers, caused the bond of the said county numbered 66 to be duly executed and issued on the first day of September, A. D. 1871, in the sum of one thousand dollars, payable December 31st, A. D. 1891, at the Farmers' Trust and Loan Company in New York, with interest thereon at the rate of eight per cent. per annum, to the said Missouri, Iowa and Nebraska Railway Company, or bearer, which said bond is in the words and figures following, to wit:

Know all men by these presents, that the County of Schuyler, in the State of Missouri, acknowledges itself indebted to the Missouri, Iowa and Nebraska Railway Company, a corporation existing under and by virtue of the laws of the States of Missouri and Iowa, formed by consolidation of the Alexandria and Nebraska City Railroad Company (formerly Alexandria and Bloomfield Railroad Company), of the State of Missouri, and the Iowa Southern Railway Company, of the State of Iowa, in the sum of one thousand dollars, which sum the said county hereby promises to pay to the said Missouri, Iowa and Nebraska Railway Company, or bearer, at the Farmers' Loan and Trust Company, in New York, on the first day of September, A. D. 1891, together with interest thereon from the 31st day of December, 1871, at the rate of eight per cent. per annum, which interest shall be payable annually in the city of New York, on the 31st day of December in each year as the same shall become due, on the presentation of the coupons hereto annexed. This bond being issued under and pursuant to orders of the county court of said Schuyler County, for subscription to the stock of the Missouri, Iowa and Nebraska Railway Company, as authorized by an act of the general assembly of the State of Missouri, entitled "An act to incorporate the Alexandria and Bloomfield Railroad Company," approved February 9th, 1857.

In testimony whereof, the said County of Schuyler has executed this bond by the presiding justice of the county court of said county, under the order of said court, signing his name hereto, and the clerk of said court, under the order thereof, attesting the same and affixing thereto the seal of said court.

This done at the town of Lancaster, in the county of Schuyler, in the State of Missouri, this first day of September, A. D. 1871.

WILLIAM CASPER,
Presiding Justice of the County Court of Schuyler County, Missouri.

18 Attest:

(SEAL SCHUYLER COUNTY COURT, MISSOURI.)

D. T. TRUITT,
Clerk of the County Court of Schuyler County, Missouri.

Countersigned and delivered this 17th day of May, 1872.

M. BAKER, *Trustee.*

To which said bond were annexed twenty interest coupons, numbered from 1 to 20 inclusive, each in the sum of eighty dollars, being for one year's interest upon the said bond, and each maturing successively one year after the other, and all bearing date September 1st, A. D. 1871.

The plaintiff further says that on the 17th day of May, A. D. 1872, the said bond so numbered, executed, and issued as aforesaid, was duly delivered to the said Missouri, Iowa and Nebraska Railway Company, together with the said interest coupons annexed thereto, as aforesaid, in payment for the said subscription of one thousand dollars for the said ten shares of its capital stock as aforesaid; and afterwards, and before the maturity of any of the said coupons, the said bond, together with the said coupons, were for value sold and transferred by delivery to the plaintiff, who is the holder and owner thereof.

That by the first maturing of the said coupons, now detached by the plaintiff from the said bond, being coupon numbered 1 of the said bond, and bearing date the said 1st day of September, A. D. 1871, and herewith filed, the said County of Schuyler promised to pay to the bearer thereof, on the 31st day of December, A. D. 1872, at the said Farmers' Loan and Trust Company in New York, the sum of eighty dollars, being one year's interest on the said bond, which said coupon was for value (together with the said bond) sold and transferred by delivery to the plaintiff before the maturity thereof, and the plaintiff is now the holder and owner thereof, and at its maturity the plaintiff caused the same to be duly presented for payment at the said place for payment, and payment thereof was not made.

That a part of the year for the year's interest for which said coupon was executed, to wit, from the 31st day of December, A. D. 1872, to the said 17th day of May, A. D. 1873, was past at the time of the delivery of the said bond and coupons, as aforesaid, to the said railway company, and the said county is, for that cause, entitled to a rebate upon the said coupon, in proportion to the time so passed before such delivery, to wit, in the sum of thirty $\frac{45}{100}$ dollars, leaving a balance of forty-nine $\frac{55}{100}$ dollars due thereon, which said balance the plaintiff says is justly due and owing to him upon the said coupon from the defendant, with interest thereon from and after the said maturity thereof, for which said balance and interest the plaintiff asks judgment.

(Then follow counts from one to forty-eight, being duplicates of the foregoing, with the exception of number of coupon & bond.)

111 Wherefore the plaintiff says that in consideration of the premises as contained and set forth in the said several counts of the foregoing petition, the defendant is justly indebted to him in the sum of two thousand three hundred and seventy-eight and $\frac{40}{100}$ dollars, with interest from the 31st day of December, 1872. For which last-mentioned sum, and interest, together with his costs, the plaintiff asks judgment.

BLAND & BAKER,
Att'ys for Plaintiff.
With whom is F. T. HUGHES.

And thereupon the clerk of said court issued a summons, which said summons, and the marshal's return thereon, is as follows, to wit:

EASTERN DISTRICT OF MISSOURI, *set:*

The President of the United States of America to the marshal of the eastern district of Missouri, greeting:

You are hereby commanded to summon the County of Schuyler,

112 in the State of Missouri, and a citizen of said State of Missouri, that it be and appear before the honorable circuit court of the United States for the eastern district of Missouri, on the first day of the next term thereof, to be holden at the city of S't Louis, in and for said district, on the third Monday of September next, then and there to answer the complaint of John T. Thomas, a citizen of the State of New York, as set forth in the petition filed in said court on the twenty-second day of August, A. D. eighteen hundred and seventy-three.

Hereof fail not, and have you then and there this writ.

Witness the honorable Nathan Clifford, senior associate justice of the Supreme Court of the United States, the twenty-second day of August, A. D. eighteen hundred and seventy-three.

Issued at office in the city of S't Louis, under the seal of said
113 circuit court, the day and year last aforesaid.

AUSTIN DRAKE,
Clerk of said Court,
By H. C. GEISBERG,
Deputy.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

Executed this writ by delivering a copy of the petition to D. T. Truitt, clerk of the county court of Schuyler County, at Lancaster, within the eastern district of Missouri, August 25th, 1873.

C. A. NEWCOMB,
U. S. Marshal, E. D. Mo.,
By WM H. BIERSTADT,
Deputy.

Marshal's fees.—1 service, 2.00. Actual expenses: R. R. fare to Schuyler and return, 22.00; deputy marshal 2 days, 10.00; hack (conveyance to Elmwood and return), 1.00—$35.00.

And thereafter, to wit, at the September term, 1874, of said
114 court, and on the 6th day of October, 1874, the said defendant, by leave of court, filed the following amended answer, to wit:

UNITED STATES OF AMERICA,
Eastern District of Missouri:

In the circuit court of the United States for the eastern district of Missouri, September term, A. D. 1874.

JOSEPH T. THOMAS, PLAINTIFF,
against
THE COUNTY OF SCHUYLER, IN THE STATE OF Missouri, defendant.

Amended answer of defendant.

The defendant comes now, and, by leave of court, for answer to the first count or cause of action mentioned in plaintiff's petition, says:

That it has no knowledge or information sufficient to form a belief as to whether the plaintiff is a resident of the State of Pennsylvania or not, and calls upon the plaintiff to make proof of
115 that allegation.

The defendant denies that any part of the route of the Alexandria and Bloomfield Railroad Company's railroad was or is in the county of Schuyler, as the same is defined in the act incorporating said railroad company.

The defendant denies that the county court of Schuyler County executed, or caused to be executed, bond numbered 102, mentioned in the first count of plaintiff's petition; denies that said bond was delivered to the Missouri, Iowa and Nebraska Railway Company in payment of the subscription to the capital stock of said railroad company, or of any part thereof, as alleged in said count of plaintiff's petition.

The defendant, for further answer, says: That it has no knowledge or information sufficient to form a belief as to whether or not said
115 pretended bond, or the coupons described in said first count of plaintiff's petition, or any of them, were transferred to plaintiff by delivery, or otherwise, before the maturity of said coupon sued upon.

Defendant denies that the bonds mentioned in said first count of plaintiff's petition, or any of them, were placed in the hands of Moses Baker, to be held in trust to be by him delivered to said railroad company upon the performance by said railway company of certain conditions of the aforesaid subscription, as averred by the plaintiff; and defendant further denies that the conditions of the aforesaid subscriptions have been performed by said railroad company.

The defendant further denies that said bond mentioned in said first count of plaintiff's petition, or any of the coupons mentioned in said count, were sold, delivered, or transferred to plaintiff before the maturity of the coupon sued upon in said first count.

117 The defendant denies that by coupon numbered one, mentioned in the first count of plaintiff's petition, this defendant promised to pay to bearer the sum of eighty dollars; it denies that said coupon is the act and deed of the county of Schuyler, and denies that the county of Schuyler orthat the county court of Schuyler County executed the bond or coupon sued upon.

2D PLEA.—For a second defense to said first count or cause of action mentioned in plaintiff's petition, the defendant says: That in the year 1857 there was an act passed, as mentioned in plaintiff's petition, to incorporate the Alexandria and Bloomfield Railroad Company, and that afterwards, on the day of September, A. D. 1864, the corporators therein mentioned accepted said act of incorporation, and organized and commenced the transaction of the business of said railroad company thereunder; that afterwards, to wit, on the day of De-
118 cember, A. D. 1864, said company duly and permanently located the line and route of its railway from its eastern terminus (the city of Alexandria, in Clark County, Missouri); thence by way of the town of Larey, in said county of Clark, to a point on the north boundary-line of the State of Missouri, near the town of Upton, in Van Buren County, Iowa, and in the direction of the town of Bloomfield, in Davis County, Iowa, and selected, located, and established said point near Upton as its western terminus.

And thereupon said company procured the right of way for its road along said route, and proceeded to construct its road on said route between said terminal points.

And defendant avers that no part of said route was within the county of Schuyler, of all which facts mentioned in this plea the plaintiff had full knowledge at the time he claims to have purchased the bond and coupons mentioned in the first count of plaintiff's petition.

119 Defendant further states that afterwards, under the act men-

tioned in the plaintiff's petition, the name of said Alexandria and Bloomfield Railroad Company was changed to that of the Alexandria and Nebraska City Railroad Company.

That on the day of , 1866, there was organized in the State of Iowa, under the laws thereof, a railroad company called the Iowa Southern Railway Company, having for the eastern terminal point of its route the said point near Upton, as aforesaid; thence by way of the town of Bloomfield, in Davis County, Iowa, west, to a point on the Missouri River west of the town of Centerville, in Appanoose County, Iowa.

And defendant avers that afterward, to wit, January, 1868, said two last-mentioned companies duly selected, located, and established said point near Upton as the point of intersection and connection of the lines of said companies, thus forming a continuous line of pro-
120 jected railway from Alexandria, Missouri, by way of said town of Upton, to Bloomfield, Davis County; thence west to the Missouri River as aforesaid; and thereupon said companies proceeded to construct said line of railway on said route as aforesaid, no part thereof being in said county of Schuyler.

And afterwards, to wit, in the year 1870, said Alexandria and Nebraska City Railway Company and said Iowa Southern Railway Company entered into articles of consolidation for the purpose of constructing said line of railroad between said points and on said route last aforesaid. Defendant avers that no part of said consolidated line is within Schuyler County. All of which facts plaintiff well knew at the time he claims to have purchased the bond and coupon sued upon.

The defendant avers that in the year 1871, prior to the 1st day of September in that year, the county of Schuyler *County* made a
121 subscription to the capital stock of the said Missouri, Iowa, and Nebraska Railway Company in the sum of one hundred and fifty thousand dollars, but defendant says that it was made by said court on its own mere motion, and without the assent of two thirds of the qualified voters of Schuyler County, and also without the assent of a majority of said qualified voters, no election, regular or special, having been held in said county whereby to obtain such assent; wherefore defendant says that said subscription was unauthorized, null, and void.

3D PLEA.—The defendant, for another and further defense to the first count of plaintiff's petition, says that in the year 1857 there was an act passed by the general assembly of the State of Missouri to incorporate the Alexandria and Bloomfield Railroad Company, as averred by plaintiff; that said company organized and commenced the transaction
122 of its business on the day of September, 1864, and that afterwards, in December, A. D. 1864, said company duly and permanently located and established the line and route of its railway from its eastern terminus (the city of Alexandria, in Clark County, Missouri); thence by way of the town of Lurey, in said county, to a point on the northern boundary-line of the State of Missouri, near the town of Upton, in Van Buren County, Iowa, in the direction of the town of Bloomfield, in Davis County, Iowa, and selected, located, and established said point near the town of Upton as its western terminus, and proceeded to construct its road on said route; and defendant avers that no part of said route was or is within the county of Schuyler.

Defendant further avers that afterwards there was an act passed by the general assembly of the State of Missouri, entitled "An act to amend an act entitled 'An act to incorporate the Alexandria and Bloom-
123 field Railroad Company,' approved Feb'y 9, 1857," which act was approved Feb'y 19, 1866.

Defendant says that on the day of , 1866, said company adopted the first section of said act, which authorized it to change its name to that of the Alexandria and Nebraska City Railroad Company, and thereunder said company did so change its corporate name.

Defendant further avers that afterwards, in the year 1866, said Alexandria and Nebraska City Railroad Company adopted the remaining sections of said amendatory act, section two of which reads as follows: "That said railroad company may extend said road from a point at or near Larey, in Clark County, Missouri, to Nebraska City, in Nebraska Territory, on the most practicable and direct route, by way of or near Rockport, in Atchison County, Missouri."

Defendant avers that, under the authority of said second sec-
124 tion of said amendatory act, the said Missouri, Iowa and Nebraska Railway Company, on the day of October, 1871, located an extension of the line of its railway from Larey, in Clark County, Missouri, thence west, by way of Memphis, in Scotland County, through the county of Schuyler, to the town of Centerville, in Appanoose County, in the State of Iowa, no part of which route was or is within the county of Davis, in said State of Iowa; and thereupon said railway company proceeded to construct the line of its road upon said route; of all which facts plaintiff had full knowledge at the time he claims to have purchased the bonds and coupon sued upon in this action, and defendant avers that said line is the only one which said company ever located or constructed into Schuyler County.

Defendant further avers that prior to said location, and prior to the first day of September, 1871, to wit, in the year 1871, the county court of Schuyler County made a subscription to the capital stock of
125 said Missouri, Iowa and Nebraska Railway Company in the sum of one hundred and fifty thousand dollars, payable in the bonds of said county, as averred by plaintiff; but defendant avers that said subscription was made by said court upon its own mere motion, and without the assent of two-thirds of the qualified voters of said county of Schuyler, and without the assent of a majority of the qualified voters of said county, no election, regular or special, having been held in said county to obtain such assent; wherefore defendant says that said court had no authority to make such subscription, and the same is void and of no effect, and that any bonds or coupons issued thereunder would be null and void.

4TH PLEA.—Defendant, for another and further defense to the first count of plaintiff's petition, says that although true it is that the county court of Schuyler County, in the year 1871, made a subscription to
126 the capital stock of the Missouri, Iowa and Nebraska Railway Company, as averred by plaintiff, yet defendant avers that by the terms of said subscription it was stipulated that before any bonds of said county should be delivered to said railway company in payment of said subscription, said railway company should execute and deliver to said county a good and sufficient bond, with security, to be approved by said county court, conditioned to indemnify and hold said county harmless against any liability to pay a subscription of $75,000, which had before that time been voted by the qualified voters of said county to the Mississippi and Missouri Air-Line Railway Company, a corporation existing under the laws of the State of Missouri; and defendant avers that neither said Missouri, Iowa and Nebraska Railway Company, nor any one for it, has executed or delivered to said county any such bond, and defendant avers that at the time the plaintiff claims to have
127 purchased the bond and coupon sued upon herein, he had full

knowledge of said stipulation in said subscription, and of the failure of said company to perform the same, wherefore defendant says that plaintiff cannot recover in this suit.

5TH PLEA.—Defendant, for another and further defense, averst that said pretended bonds were not registered as is required by an act of the general assembly of the State of Missouri, approved March 30th, 1872, and for that cause defendant says that no action can be maintained thereon.

B. G. BARROW AND
ED'D HIGBEE,
Att'ys for Def't.

W'm Lindsey and W'm B. Newman, two justices of the county court of the county of Schuyler, being duly sworn, upon their oaths state that, to the best of their knowledge, information, and belief, the
128 allegations in the foregoing answer are true in substance and in fact; that the county of Schuyler did not execute the bonds or coupons sued upon, or any of them, nor did it authorize the execution and delivery thereof by another.

W'M LINDSEY.
W. B. NEWMAN.

Subscribed and sworn to before me this 6th day of October, A. D. 1874.

H. C. GEISBERG,
Com'r U. S. Cir. Ct, E. D. Mo.

6TH PLEA.—Def't, for another and further defense to the first count of pl'ff's petition, says that in the year 1857 there was an act passed by the general assembly of the State of Missouri to incorporate the Alexandria and Bloomfield Railroad Company, as averred in pl'ff's petition, in the first count thereof; that said company organized and commenced the transaction of its business on the day of September, 1864,
129 and that afterwards, in the month of December, 1864, said company duly and permanently located and established the line and route of its railway from its eastern terminus, the city of Alexandria, in Clark County, Missouri, thence by way of the town of Lurey, in said county, to a point on the northern boundary-line of the State of Missouri, near the town of Upton, in the county of Van Buren, in the State of Iowa, in the direction of the town of Bloomfield, in the county of Davis, in the State of Iowa, as authorized and required by the said act incorporating said company; and thereupon said company duly selected, located, and established said point near the said town of Upton as its western terminus, and proceeded to construct its road on said route along the entire length thereof, and procured the right of way therefor; and def't avers that no part of said route so located and estab-
130 lished was or is within the said county of Schuyler.

And def't avers that afterwards there was an act passed by the general assembly of the State of Missouri, approved February 19, 1866, entitled "An act to amend an act entitled 'An act to incorporate the Alexandria and Bloomfield Railroad Company,'" approved February 9th, 1857; and def't avers that on the day of , A. D. 1866, the Alexandria and Bloomfield Railroad Company adopted the first section of said act, which authorized it to change its corporate name to that of the Alexandria and Nebraska City Railroad Company, and that under said section said company did so change its corporate name, as averred by plaintiff.

Def't further avers that afterwards, during the said year 1866, said last-mentioned company adopted the remaining sections of said
131 amendatory act, the second section of which reads as follows:

"That said railroad company may extend said road from a point at or near Lurey, in Clark County, Missouri, to Nebraska City, in Nebraska Territory, on the most practicable and direct route, by way of or near Rockport, in Atchison County, Missouri."

Def't further avers that in the year 1866 there was duly organized in the State of Iowa, under the laws thereof, a railroad company called the Iowa Southern Railway Company, having for the eastern terminal point of the south branch of its route the said point where the line of said Alexandria and Bloomfield Railroad Company should intersect the north boundary-line of the State of Missouri; from thence the route of said railway company was to run by way of the town of Bloomfield, in Davis County, Iowa, and thence to the Missouri River to a point west
132 of the town of Centerville, in Appanoose County, Iowa.

And def't avers that afterwards, in the year 1868, said Iowa Southern Railroad Company and said Alexandria and Nebraska City Railroad Company duly selected, located, and established said point near said town of Upton as the point of intersection and connection of the lines of said companies, as authorized and empowered to do by the act incorporating the Alexandria and Bloomfield Railroad Company aforesaid, thus forming a continuous line of projected railway from the city of Alexandria aforesaid, by way of the town of Lurey aforesaid, connecting and intersecting on the boundary-line between the States of Iowa and Missouri at said point near Upton, and thence by way of Bloomfield, in Davis County, Iowa, to a point on the Missouri River west of Centerville, in the State of Iowa aforesaid, and def't avers
133 that thereupon said companies proceeded to construct said line of railway along the entire length thereof, between the city of Alexandria and the town of Bloomfield, in Davis County, Iowa, and def't avers that no part of said route or line was, or is within the county of Schuyler aforesaid.

Def't further avers that under the authority of the second section of the aforesaid amendatory act, approved February 19, 1866, and by virtue of its provisions, the said Missouri, Iowa and Nebraska Railway Company (a company formed in the year 1870 by the consolidation of the stock, lines, &c., of said Iowa Southern Railway Company and said Alexandria and Nebraska City Railroad Company, as averred in pl'ff's petition), on the day of October, 1871, located an extension of the line of its railway from Lurey, in said county of Clark, in the State of Missouri, thence west through the counties of Scotland and Schuy-
134 ler to the town of Centerville, in Appanoose County, Iowa, and thereafter did construct and put into operation said line of railway as aforesaid; and def't avers that said line of railway is the only one which said company ever surveyed, located, or constructed into said county of Schuyler, and that no part of said line was or is within the county of Davis, in the State of Iowa.

And def't avers that prior to said location, to wit, in the year 1871, and prior to the 1st day of September of said year, the county court of Schuyler County aforesaid made the subscription mentioned in pl'ff's petition to the capital stock of the said Missouri, Iowa and Nebraska Railway Company, payable in the bonds of said county, as averred in pl'ff's petition; but def't avers that said county court made said subscription upon its own mere motion, without the assent of two thirds of the qualified voters of said county, and without the assent of a large

majority of the qualified voters of said county—no election, regular or special, having been held in said county of Schuyler to obtain such assent. Wherefore def't says that said subscription was an unauthorized usurpation of power, void and of no effect, and that any bond that could or might have been issued thereunder would be null and void.

BARRON & HIGBEE,
Att'ys for Def't.

And afterwards, at said term of said court, the plaintiff filed the following demurrer to part of the amended answer of defendant, to wit:

THE UNITED STATES OF AMERICA,
Eastern District of Missouri:

In the circuit court of the United States for the eastern district of Mo.

JOSEPH T. THOMAS, PLAINTIFF,
vs.
THE COUNTY OF SCHUYLER, DEFENDANT.

The plaintiff in this action demurs to all that part of defendant's third amended answer wherein, under the title of "2d plea," he pleads his second defense, and for the following ground of objection, to wit: Said plea does not state facts sufficient to constitute a defense to plaintiff's action, in this, that the same, in all of its averments, is immaterial and irrelevant to the issue in this cause.

2d. That so much of said plea as attempts to avoid the subscription of Schuyler County to the stock of the Missouri, Iowa and Nebraska Railroad Company is immaterial, for the reason that by the charter of the Alexandria and Bloomfield Railroad Company, pleaded in plaintiff's petition, no vote was necessary or required to authorize said county court to subscribe said stock.

2d. And said plaintiff further demurs to all that part of said answer as is stated under the head of "3d plea," for the following ground of objection: That said plea does not state facts sufficient to constitute a defense to plaintiff action, in this, that each and every fact averred therein is immaterial to any issue in this cause.

2d. That so much of said plea as attempts to avoid the subscription of Schuyler County to the capital stock of the Missouri, Iowa and Nebraska Railway is immaterial, for the reason that by the charter of the Alexandria and Bloomfield Railroad, as pleaded in plaintiff's petition, no vote was necessary or required to authorize said county court to subscribe said stock.

3d. And the plaintiff further demurs to that part of defendant's said answer pleaded under the title of "4th plea," for the following ground of objection, to wit: Said plea does not contain fact sufficient to constitute a defense to plaintiff's action, in this, that it appears on the face of said answer that the alleged condition on which said subscription was made was waived by said defendant, and it does not appear that said waiver was the result of any fraud or misrepresentation on part of the plaintiff or its agents.

2d. The performance of said condition was not material to the validity of the bonds or coupons here sued on, and constituted no essential part of the power of said court to make said subscription.

BLAND & BAKER,
Att'ys for Plaintiff.

And plaintiff further demurs to all that part of said answer as is stated under the head of "6th plea," for the following grounds of objection, to wit: That said plea does not state facts sufficient to constitute a *a* defense to plaintiff's action, in—

1st. This, that each and every allegation in said plea is immaterial to any issue in this cause.

2d. That so much of said plea as attempts to avoid the pay-
139 ment of said bond on the grounds that the subscription of Schuyler County to the stock of the Missouri, Iowa and Nebraska Railway Company, on the ground that the said subscription was not authorized by a vote of the qualified voters of said county, is immaterial, for the reason that unless and by virtue of the charter of the Alexandria and Bloomfield Railroad Company, pleaded in plaintiff's petition, no vote was necessary or required to authorize said subscription.

3d. That it is admitted by said plea that the Alexandria and Bloomfield Railroad Company was chartered by the act of Feb'y 9th, 1857, recited in plaintiff's petition. That thereafter, by authority of law, the said Alexandria and Bloomfield Railroad changed its name to that of the Alexandria and Nebraska City Railroad, and that thereafter the said Alexandria and Nebraska City Railroad, by consolidation with the Iowa Southern Railroad Company, formed the Missouri, Iowa and
140 Nebraska Railway Company, and that the county court of Schuyler did subscribe to the stock of the said Missouri, Iowa and Nebraska Company, and does not deny or traverse the allegations in plaintiff's petition that the coupons sued on were coupons attached to the bonds of said county issued in payment of said subscription, or that the copy thereof as recited in plaintiff's petition is a true copy of said bond, nor does the defendant charge or aver in said plea that the plaintiff at or before the time he purchased said bonds, knew, or had any notice that the recitals contained in said bonds were false or untrue.

BLAND & BAKER,
Att'ys for Plaintiff.

141 And afterwards, at said September term of said court, and on the 9th day of October, 1874, the following appears of record in said cause, to wit:

JOSEPH T. THOMAS, PLAINTIFF,
vs.
COUNTY OF SCHUYLER, DEFENDANT.

This day come the parties, by their respective attorneys, the plaintiff by P. E. Bland, esquire, and the defendant by Edward Higbee, esquire, and the court having examined the questions of law arising on the demurrer to the second, third, and sixth pleas of said defendants' answer, and being fully advised in the premises, is of opinion that the law upon said demurrer is for the plaintiff, and said demurrer is therefore sustained, and said pleas are, and each of them is, held to be an insufficient bar to plaintiff's cause of action, and said defendant electing to abide by the decision of the court upon said demurrer, and failing to plead further herein, and this action being founded upon certain coupons in the petition described, the court finds the plaintiff has sustained damages by reason of the non-payment of said coupons in the sum of ($2,618.33) twenty-six hundred and eighteen dollars and thirty-three cents.

142 It is, therefore, now considered by the court that the plaintiff, Joseph T. Thomas, recover against the County of Schuyler the

sum of twenty six hundred and eighteen dollars and thirty-three cents, the damages so as aforesaid by the court assessed, and also the costs herein expended, and that execution be issued therefor.

Thereupon the court made a certificate signed by the judges, that said judges were divided and opposed in opinion on certain questions or points of law arising upon the said demurrer, which certificate is ordered to be filed and made a part of the record in the cause.

And the said certificate so signed and filed as aforesaid, is in words as follows, to wit:

UNITED STATES OF AMERICA,
Eastern District of Missouri:

At a circuit court of the United States begun and held at the city of Saint Louis, in the State of Missouri, on the third Monday of September, in the year of our Lord one thousand eight hundred and seventy-four, and in the ninety-ninth year of American Independence.

Present the honorable John F. Dillon and Samuel Treat.

JOSEPH T. THOMAS, PLAINTIFF,
vs.
143 THE COUNTY OF SCHUYLER, IN THE State of Missouri, defendant.

State of the pleadings.

This is an action to recover the amount claimed to be due to the plaintiff (as holder thereof) on forty-eight interest-coupons detached from forty-eight bonds issued by Schuyler County, in the State of Missouri, in part payment for a subscription made by said county of Schuyler, at the instance of the county court and by its order of record, to the Missouri, Iowa and Nebraska Railroad Company.

The petition in this case states in substance the following facts:

1st. That the plaintiff is a citizen of the State of Pennsylvania, and that the defendant is a county and citizen of the State of Missouri.

That by an act of the general assembly of the State of Missouri, entitled "An act to incorporate the Alexandria and Bloomfield Railroad Company," approved February 9, 1857, there was incorporated the Alexandria and Bloomfield Railroad Company, the 10th section of which act is as follows:

"The said company shall in all things be subject to the same restrictions and entitled to all the privileges, rights, and immunities which were granted to the North Missouri Railroad Company by an act
144 entitled "An act to incorporate the North Missouri Railroad Company," approved March 3, 1851, so far as the same are applicable to the company hereby created, as fully and completely as if the same were herein re-enacted."

And that the 14th section of the last-named act contained the following provision: "It shall be lawful for the county court of any county in which any part of the route of said railroad may be, to subscribe to the stock of said company, * * * and issue the bonds of such county to raise funds to pay the stock thus subscribed."

That a part of the route of the said Alexandria and Bloomfield Railroad Company was within the said county of Schuyler, as the same is defined in said corporating act. That by virtue of the first section of an act of the general assembly of the State of Missouri, entitled "An act to amend an act to incorporate the Alexandria & Bloomfield Rail-

road Company," approved February 19, 1866, the said Alexandria and Bloomfield Railroad was authorized to change its name to the Alexandria and Nebraska City Railroad Company, and that thereafter said company did adopt the said first section of said amendatory act, and did change its name to that of the Alexandria and Nebraska City Railroad Company.

145 That thereafter the said Alexandria and Nebraska City Railroad Company consolidated with the Iowa Southern Railway Company, a corporation existing under the laws of Iowa, and thereafter the name of said consolidated company was the Missouri, Iowa and Nebraska Railway Company.

That in the year 1871, and prior to the first day of September of said year, the county court of Schuyler County, in the State of Missouri, subscribed to the capital stock of said Missouri, Iowa and Nebraska City Railway Company the sum of one hundred and fifty thousand dollars, for one thousand five hundred shares of the capital stock of said company, and that in pursuance of the powers so granted as aforesaid the said county court caused the bond No. 102 to be executed and issued on the 1st day of September, 1871, for one thousand dollars, payable December 31st, 1891, in the words and figures following:

Know all men by these presents, that the county of Schuyler, in the State of Missouri, acknowledges itself indebted to the Missouri, Iowa and Nebraska Railway Company, a corporation existing under and by virtue of the laws of the States of Missouri and Iowa, formed by consolidation of the Alexandria and Nebraska City Railroad Com-

146 pany (formerly Alexandria and Bloomfield Railroad Company), of the State of Missouri, and the Iowa Southern Railway Company, of the State of Iowa, in the sum of one thousand dollars, which sum the said county hereby promises to pay to the said Missouri, Iowa and Nebraska Railroad Company, or bearer, at the Farmers' Loan and Trust Company, in New York, on the 1st day of September, 1891, together with interest thereon from the 31st day of December, 1871, at the rate of eight per cent. per annum, which interest shall be payable annually in the city of New York, on the 31st day of December in each year, as the same shall become due, on the presentation of the coupons hereto annexed. This bond being issued under and pursuant to orders of the county court of said Schuyler County for subscription to the stock of the Missouri, Iowa and Nebraska Railway Company, as authorized by an act of the general assembly of the State of Missouri, entitled "An act to incorporate the Alexandria and Bloomfield Railroad Company," approved February 9, 1857.

In testimony whereof the said county of Schuyler has executed this bond by the presiding justice of the county court of said county, under the order of said court, signing his name hereto, and the clerk of

147 said court, under the order thereof, attesting the same and affixing the seal of said court thereto.

This done at the town of Lancaster, in the county of Schuyler, in the State of Missouri, this 1st day of September, A. D. 1871.

(Signed) WILLIAM CASPER,
Presiding Justice of the County Court of Schuyler County, Missouri.

Attest: D. T. TRUIT,
Clerk of the County Court of Schuyler County, Missouri.

Countersigned and delivered this 17th day of May, 1872.
(Signed) M. BAKER, *Trustee.*

To which bond was annexed 20 interest coupons, numbered from one to twenty, each for eighty dollars, and maturing annually and successively on the 31st day of December in each year, and dated Sept. 1st, 1871.

That on the 1st day of September, 1871, said bond was delivered to Moses Baker, treasurer of Schuyler County, to be by the said Baker held in trust for *for* the said railroad company, until certain conditions of said subscription were complied with on part of said railroad company.

That on the 17th of May, 1872, the said bond was delivered to the said railway company in payment for said subscription; that plaintiff became the holder and owner of said bond and coupon before maturity;
148 that by the 1st maturing of said coupons there was due to the plaintiff the sum of eighty dollars; that from the 31st day of December, 1871, to the 17th day of May, 1872, being the date of the delivery of said bonds, no interest was to accrue, and that on said 17th day of May, 1872, and before delivery of said bonds, there was a credit of thirty & $\frac{4}{100}$ dollars entered on said coupon, leaving a balance due thereon of forty-nine & $\frac{53}{100}$ dollars, which is still unpaid and for which plaintiff asks judgment.

There follows forty-seven other similar counts upon the first maturing coupons of forty-seven other of said bonds.

The defendant first pleads in denial the following:

That any part of the route of the Alexandria & Bloomfield Railroad Company's railroad was or is in Schuyler County, as defined in the act incorporating railroad company.

Denies that any of the bonds or coupons sued on were transferred to plaintiff before maturity. Denies that any of the bonds were placed in the hands of Moses Baker to be by him delivered upon the performance of certain conditions. Denies that the conditions were ever complied with.

The second plea states in substance as follows:

149 That in the year 1857 there was an act passed to incorporate the Alexandria and Bloomfield Railroad Company, as stated in plaintiff's petition, and that on the day of September, 1864, the corporation therein named accepted said act and organized and commenced its business; that in December, 1866, said company permanently located the line and route of its railway from Alexandria, in Clark County, Missouri; thence by way of Luray, in said county of Clark, to a point on the north boundary line of Missouri, near the town of Upton, in Van Buren County, Iowa, and in the direction of the town of Bloomfield, in Davis County, Iowa, and established said point as its western terminus, procured the right of way along said route, and proceeded to construct its road on said route between said terminal points, no part of which route was within the county of Schuyler; of all which facts mentioned in this plea the plaintiff had full knowledge at the time he claims to have purchased the bond and coupon mentioned in the first and all the other counts in the petition of plaintiff.

That afterwards, under the act mentioned in plaintiff's petition, the name of the Alexandria and Bloomfield Railroad Company was changed to the Alexandria and Nebraska City Railroad Company; that in 1866 there was organized under the general incorporation laws of the
150 State of Iowa a railroad company called the Iowa Southern Railway Company, having for its eastern terminus the said point near Upton; thence by way of Bloomfield, in Davis County, Iowa, to the Missouri River, west of the town of Centerville, in Appanoose County, Iowa; that in 1868 said two last-mentioned companies duly selected,

located, and established said point near Upton as the point of intersection and connection of the lines of said companies, thus forming a continuous line from Alexandria, Missouri, via Upton and Bloomfield, Iowa, to the Missouri River as aforesaid; thereupon said companies proceeded to construct said line on said route, no part thereof being in said county of Schuyler.

That in 1876 said last-mentioned companies entered into articles of consolidation for the purpose of constructing said line, no part of which consolidated line is within Schuyler County; all of which facts plaintiff knew at the time he claims to have purchased the bonds and coupons sued on.

That in 1871, and prior to the 1st of September of said year, the county court of Schuyler County made the subscription mentioned in plaintiff's petition, but defendant says that it was made by said court on its own mere motion, and without the assent of two-thirds of the qualified
151 voters of said county, and without the assent of a majority of said voters, no election, regular or special, having been held to obtain such assent; wherefore said subscription is void.

For a third plea the defendant states, in substance, that in 1857 there was an act passed to incorporate the Alexandria and Bloomfield Railroad Company, as averred by plaintiff; that in September, 1864, said company organized and commenced the transaction of its business; that in December, 1864, it duly and permanently located the line and route of its railway from its eastern terminus, the city of Alexandria, in Missouri, thence via the town of Luray, in Clark County, Missouri, to a point on the north boundary line of the State of Missouri, near the town of Upton, in Van Buren County, Iowa, in the direction of the town of Bloomfield, in Davis County, Iowa, and selected and established said point near Upton as its western terminus, and proceeded to construct its road on said route; and defendant avers that no part of said route was or is within Schuyler County; that afterwards the amendatory act of February 19, 1866, referred to in plaintiff's petition, was passed by the general assembly of the State of Missouri, and that the first section was adopted, and the name of said Alexandria and Bloomfield Railroad was changed, as averred by plaintiff; and that thereafter, and in
152 the year 1866, the remainder of said act was adopted by the Alexandria and Nebraska City Railroad Company.

That under the authority of the second section of said amendatory act the said Missouri, Iowa and Nebraska Railway Company, in October, 1871, located an extension of the line of its railway from Luray, in Clark County, through the counties of Scotland and Schuyler, in the State of Missouri, and via Lancaster, in said last-mentioned county, to Centerville, in Appenoose County, Iowa, no part of which route was or is within Davis County, *County*, Iowa, and said company proceeded to construct the line of its road on said route; of all which facts plaintiff had full knowledge at the time he claims to have purchased the bonds and coupons sued upon; and that said line is the only one said company ever located or constructed into Schuyler County.

That prior to said location, and in the year 1871, and prior to the first day of September in that year, the county court of Schuyler County made the subscription to the capital stock of said company, as averred by plaintiff; but defendant avers that said subscription was made by said court of its own mere motion, and without the assent *assent*
153 of two-thirds of the qualified voters of said county, and without the assent of a majority of the qualified voters of said county, no election, regular or special, having been held to obtain such assent;

wherefore such subscription is void; any bonds or coupons issued thereon is void.

And for the 4th plea defendant states, in substance, that, although the county court of Schuyler County in 1871 made the subscription as averred by plaintiff, yet, by the terms of said subscription, it is stipulated that, before any bond of said county should be delivered to said railway company in payment of said subscription, said company should execute to said county a bond, with security to be approved by said county court, conditioned to indemnify said county against any liability to pay a subscription of $75,000.00 which had before that time been voted by the qualified voters of said county to the Mississippi and Missouri River Air-Line Railway Company, a corporation existing under the laws of Missouri; that neither said Missouri, Iowa and Nebraska Railway Company, nor any one for it, have executed to said county any such bond, and that at the time plaintiff claims to have purchased the
154 bond and coupon sued upon he had full knowledge of said stipulation in said subscription, and of the failure of said company to perform the same; wherefore plaintiff cannot recover in this suit.

And, for a fifth plea, defendant aver' that said pretended bonds were not registered, as is required by an act of the general assembly of the State of Missouri, approved March 3d, 1872; and for that cause no action can be maintained thereon.

For a sixth plea defendant states that in the year 1857 there was an act passed to incorporate the Alexandria and Bloomfield Railroad Company, as averred by plaintiff; that said company organized and commenced the transaction of its business in September, 1864, and in December, 1864, permanently located the line and route of its road from Alexandria, in Clark County, via the town of Luray, in said county, to a point on the north boundary-line of Missouri, near the town of Upton, in Van Buren County, Iowa, in the direction of Bloomfield, in Davis County, Iowa, and thereupon selected, located, and established said point near Upton as its western terminus, and procured the right of way, and proceeded to construct its road on said route along the entire length thereof, no part of which route so located was or is in Schuyler County, Missouri.

155 That after the said Alexandria and Bloomfield Railroad had adopted the first section of the act of February 19th, 1866, as pleaded in plaintiff's petition, and during the said year of 1866, the Alexandria and Nebraska City Railroad adopted the remainder of said act, the second section of which is as follows: "That said railroad company may extend said road from a point at or near Luray, in Clark County, Missouri, to Nebraska City, in Nebraska Territory, on the most practicable and direct route, by way of or near Rockport, in Atchison County, Missouri."

That in 1866 there was organized in the State of Iowa a company known as the Iowa Southern Railway Company, the south branch of which commenced where the line of the Alexandria and Bloomfield Railroad Company intersected the State line near the said town of Upton; the line ran thence to Bloomfield, in Davis County, Iowa, and thence to a point on the Missouri River west of Centerville, in Appenoose County, Iowa; that in 1868 said Iowa Southern Railway Company and the Nebraska City Railroad Company selected and established said point near Upton as the point of intersection and connection of the lines of said companies, thus forming a continuous line from Alexandria, by way of Luray, Upton, and Bloomfield, to the Mis-
156 souri River, and proceeded to construct said road from Alexan-

dria to Bloomfield, and no part of said route or line was in Schuyler County.

That in 1870 the said last-mentioned railroad companies consolidated their stock, lines, &c., under the name of the Missouri, Iowa and Nebraska Railroad, as averred by plaintiff, and on the day of October, 1871, by virtue of the provisions of the second section of said amendatory act of February 9th, 1866, said consolidated company located an extension of its line of road from Luray, in Clark County, Missouri, thence west through Scotland and Schuyler counties to Centerville, in Appanoose County, Iowa, and thereafter constructed said line and put it in operation, but that no part of said line is within Davis County, Iowa, and is the only line of said company ever surveyed, located, or surveyed into said county of Schuyler.

That the county court of said county of Schuyler made the subscription mentioned in plaintiff's petition prior to September 1st, 1871, and in that year, on its own mere motion, no election, regular or special, having been held in said county of Schuyler to obtain the assent of the qualified voters of said county, and that said subscription was made without the assent of two thirds of the voters of said county, and
157 without the assent of a majority of the voters of said county, and is therefore null and void.

And to this answer plaintiff interposed a demurrer, as follows:

The plaintiff demurs to all that part of defendant's answer wherein, under the title of second plea, he pleads his second defence, for the following grounds of objection, to wit:

Said plea does not state facts sufficient to constitute a defense to plaintiff's action, in this, that the same in all its averments is immaterial and irrelevant to the issues in this cause.

2d. That so much of said plea as attempts to avoid the subscription of Schuyler County to the stock of the Missouri, Iowa and Nebraska Railway Company is immaterial, for the reason that by the charter of the Alexandria and Bloomfield Railroad Company, pleaded in plaintiff's petition, no vote was necessary or required to authorize said county court to subscribe said stock.

And said plaintiff further demurs to defendant's 3d plea, for the following grounds of objection: that said plea does not state facts sufficient to constitute a defense to plaintiff's action, in this, that each and every averment of fact therein is immaterial to any issue in this cause.

2d. That so much of said plea as attempts to avoid the said
158 subscription is immaterial, for the reason that by the charter of the Alexandria and Bloomfield Railroad Company no vote was necessary or required to authorize said county court to subscribe said stock.

And plaintiff demurs to the 4th plea of defendant's answer, for that said plea does not state facts sufficient to constitute a defense to plaintiff's action, in this, that it appears on the face of said answer that the alleged condition on which said subscription was made was waived by said defendant, and it does not appear that said waiver was the result of any fraud or misrepresentation on the part of the plaintiff or its agents.

2d. That the performance of said condition was not material to the validity of the bonds or coupons here sued on, and constituted no essential part of the power of said court to make said subscription.

And plaintiff further demurs to the 6th plea of defendant's answer, for

that said plea does not state facts sufficient to constitute a defense to plaintiff's action, in this:

1st. That each and every allegation in said plea is immaterial to any issue in this cause.

2d. That so much of said plea as attempts to avoid the payment of said bond on the ground that the said subscription was not authorized by a vote of the qualified voters of said county is immaterial, for
159 the reason that, under and by virtue of the charter of the Alexandria and Bloomfield Railroad, pleaded in plaintiff's petition, no vote was necessary or required to authorize said subscription.

3d. That it is admitted by said plea that the Alexandria and Bloomfield Railroad Company was chartered by the act of February 9, 1857, recited in plaintiff's petition; that thereafter said company, by authority of law, changed its name to that of the Alexandria and Nebraska City Railroad, and that thereafter said Alexandria and Nebraska City Railroad Company, by consolidation with the Iowa Southern Railway Company, formed the Missouri, Iowa and Nebraska Railway Company, and that the county court of Schuyler County did subscribe to the stock of said company, and issue the bonds and coupons sued on for the payment of said stock, and said plea does not deny or traverse the allegation in plaintiff's petition, that the coupons sued on were coupons attached to the bonds of said county, issued in payment of said subscription, or that the copy thereof, as recited in plaintiff's petition, is a true copy of said bond, nor does the defendant charge or aver in said plea that the plaintiff, at or before the time he purchased said bonds, knew or had any notice that the recitals contained in said bonds were false or untrue.

160 In the consideration of the said demurrer, by consent of parties, it was agreed that parties should consider the said act of February 9th, 1857, the act of March 3d, 1851, incorporating the North Missouri Railroad Company, and the said act of February 19th, 1866, as public acts, and the following map, as showing the location of Clark and other counties, and the towns of Alexandria, Luray, Upton, Bloomfield, Lancaster, and Centerville.

The court, after argument, and being fully advised, sustained the demurrer to the 2d, 3d, & 6th pleas in the answer, hereinbefore set forth, and rendered a judgment that the said pleas were, and each of them was, insufficient in law as a defence to the plaintiff's action, and final judgment against the defendant in favor of the plaintiff was entered.

And the undersigned judges, before whom the said action was tried, do hereby certify that the following questions occurred on the hearing of the said demurrer and in the said decision thereon, in which the said judges were divided in opinion, to wit:

1st. Whether, upon the facts stated in the said 2d, 3d, and 6th pleas, as heretofore recited, there was any power in the county court of Schuyler County to make a subscription to the stock of the said Missouri, Iowa and Nebraska Railway Company, and to issue to it the
161 bonds and coupons in suit, without a vote of the qualified voters of the county, as required by Article II, section 14, of the constitution of the State of Missouri, which went into effect July 4th, 1865, and is yet in force.

2d. Whether, under the constitution and laws of Missouri, the bonds the coupons whereof in suit are valid and enforceable in the hands of a bona fide holder for value, having been issued without any election or vote of the people of the county, as started in the sixth plea.

3rd. Whether the recital in the bonds, the coupons of which are in

suit, that they were issued as authorized by act of February 9, 1857, is binding upon the county in favor of a bona-fide holder thereof for value, and without notice, if in fact they were not issued under that act as amended February 19th, 1866, and after the second section thereof had been adopted by the company, and its road extended through Schuyler County to Centerville, without *without* a previous vote by the people, as stated in the said pleas.

4th. Whether the recital in the bonds, the coupons of which are in suit, that they were issued as authorized by act of February 9, 1857, is binding upon the county in favor of a purchaser who takes said bonds with notice of the facts as hereinafter stated, to wit, that
162 in fact they were not issued under that act, but were issued without a previous vote by the people, under that act as amended by the act of February 19th, 1866, and after the second section thereof had been adopted by the company, and the route of its road extended by virtue thereof through Schuyler County to Centerville, as stated in said pleas.

5th. Whether, upon the facts stated in said 2d, 3d, and 6th pleas, any part of the line or route of the railroad was in Schuyler County by authority of said act of 1857, or solely by authority of the said act of 1866; that is, whether, if the line could under said act of 1857 be located in Schuyler County, but was not actually located there under said act, but under said act of 1866, the authority to subscribe existed in the county without a vote of the people.

6th. The court differed in opinion whether the second plea was an answer in law to the plaintiff's action.

7th. The court differed in opinion whether the third plea was a sufficient answer in law to the plaintiff's action.

8th. The court differed in opinion whether the sixth plea was a sufficient answer in law to the plaintiff's action.

Whereupon, upon the motion of the defendant's counsel, it is
163 ordered that the foregoing state of the pleadings and statement of facts, made under the direction of the judges, together with a certified copy of said acts and the said map, be certified to the Supreme Court of the United States for its action and decision thereon.

Given under our hands this 9th day of October, 1874.

JOHN F. DILLON.
SAMUEL TREAT.

164 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true copy of the record and proceedings in case No. of J. T. Thomas, plaintiff, against Schuyler County, defendant, as fully as the same remain' on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of S't Louis, in said district, this first day of September, in the year of our Lord eighteen hundred and seventy-five.

[SEAL.]

M. M. PRICE,
Clerk of said Court,
By C. M. WARD, *Deputy.*

(Indorsement on cover:) No. 321. The County of Schuyler, in the State of Missouri, plaintiff in error, vs. Joseph T. Thomas. E. Missouri C. C. U. S. Filed 3rd December, 1875.

In the Supreme Court of the United States.

No. 62.

THE COUNTY OF SCHUYLER, PLAINTIFF IN ERROR,

Vs.

JOSEPH L. THOMAS.

Error to the Circuit Court U. S. Eastern District of Missouri.

BRIEF OF GEORGE W. McCRARY,

For Plaintiff in Error.

Supreme Court of the United States.

No. ~~221~~ 62

THE COUNTY OF SCHUYLER, PLAINTIFF IN ERROR,

vs.

JOSEPH L. THOMAS.

Error to the Circuit Court U. S. Eastern District of Missouri.

BRIEF OF GEORGE W. McCRARY FOR PLAINTIFF IN ERROR.

STATEMENT.

The case stands upon demurrer to the answer and a certificate showing that the judges of the court below were divided in opinion thereon.

The plaintiff below sued the County of Schuyler on certain coupon bonds executed in the name of the county to the Missouri, Iowa and Nebraska Railroad Company, in payment for stock in said company, for which the county commissioners had undertaken to subscribe.

The legislation by virtue of which the county claimed and undertook to exercise the power to subscribe to the stock of said company is as follows:

1. "An act to incorporate the Alexandria and Bloomfield R. R. Company, approved February 9th, 1857."

This act describes and fixes the *route* of the railroad chartered by it as follows:

"Said company shall have full power to survey, mark,

locate and construct a railroad from the city of Alexandria, in the county of Clark, *in the direction of Bloomfield*, in the State of Iowa, to such a point on the northern boundary line of the State of Missouri as shall be agreed upon by said company and a company authorized on the part of the State of Iowa to construct a railroad to intersect the road authorized to be constructed by the provisions of this act at the most practicable point on said State line, and for that purpose may hold a strip of land not exceeding one hundred feet wide, and may hold sufficient land for the construction of depots, warehouses, and water stations, and may select such route as may be deemed most advantageous."

Laws of Missouri, 1856–7, p. 95.

Section 10 gives to the Alexandria and Bloomfield R. R. Company "all the privileges, rights and immunities, which were granted to the North Missouri Railroad Company" by its charter.

The charter of the latter company contained the following provision:

"§ 14. It shall be lawful for the county court of any county *in which any part of the route of said road may be*, to subscribe to the stock of said company, and it may invest its funds in the stock of said company, and issue the bonds of such county to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interests and credit of the county."

2. "An act to amend an act entitled 'An act to incorporate the Alexandria and Bloomfield Railroad Company,' approved February 9, 1857." This act was approved February 19, 1866. (Sess. Laws, 1866, p. 222.)

This act was to take effect when adopted by the board of directors of the Alexandria and Bloomfield Railroad Company. Said board did adopt the first section, which authorized a change of the corporate name of the company to the Alexandria and Nebraska City Railroad Company, and the name was accordingly changed.

The said Alexandria and Nebraska City Company subse-

quently, *and during the year* 1866, adopted the second section of said act, which is as follows:

"That said railroad company may extend said road from a point near Luray, in Clarke county, Missouri, to Nebraska city, in Nebraska Territory, on the most practicable and direct route by way of or near Rockport, in Atchison county, Missouri."

3. The act known as the Consolidation Act, approved March 2, 1869.

This act authorized any railroad company organized under laws of Missouri, and whose "track shall, at the line of the State, connect with the track of any railroad organized under the general or special laws of any adjoining State," to enter into articles of consolidation with such company.

4. Prior to all this legislation, except that named under the first subdivision above, the people of Missouri adopted the following constitutional provision, which went into force July 4, 1865.

"CONSTITUTION MO., ART. 11, SEC. 14.—The General Assembly shall not authorize any county, city, or town to become a stockholder in or to loan its credit to any company, association, or corporation, unless *two-thirds of the qualified voters of such county*, city, or town, at a regular or special election to be held therein, shall assent thereto." (Wagner's Statutes, Ed. 1872, p. 62.)

The subscription by Schuyler county to the stock of the Missouri, Iowa, and Nebraska Railroad Company was made without a vote of the people to authorize it.

The Missouri, Iowa, and Nebraska Railroad Company was formed by consolidation of the Alexandria and Nebraska City Railroad Company, and the Iowa Southern Railway Company of Iowa.

The second, third, and sixth pleas of the answer, which are demurred to and thereby admitted to be true, set forth in addition to the above legislation the following among other facts.

1. The second plea alleges that in accordance with its charter the Alexandria and Bloomfield Railroad Company was organized, and then said plea proceeds as follows:

"That afterwards, to wit, on the ____ day of December, 1864, said company duly and permanently located the line and route of its railway from its eastern terminus (the city of Alexandria, in Clarke county, Missouri;) thence by way of the town of Luray, in said county of Clarke, to a point on the north boundary line of the State of Missouri, near the town of Upton, in Van Buren county, Iowa, and in the direction of the town of Bloomfield, in Davis county, Iowa, and selected, located, and established said point near Upton as its western terminus.

"And thereupon said company procured the right of way for its road along said route, and proceeded to construct its road on said route between said terminal points.

"And defendant avers that no part of said route was within the county of Schuyler, of all which facts mentioned in this plea the plaintiff had full knowledge at the time he claims to have purchased the bond and coupons mentioned in the first count of plaintiff's petition."

The same plea further alleges that under the act of February 19th, 1866, amending the charter, the name of the company was changed to the Alexandria and Nebraska City Railroad Company, and then proceeds as follows:

"That on the ____ day of ____, 1866, there was organized in the State of Iowa, under the laws thereof, a railroad company called the Iowa Southern Railway Company, having for the eastern terminal point of its route the said point near Upton, as aforesaid; thence by way of the town of Bloomfield, in Davis county, Iowa, west, to a point on the Missouri river west of the town of Centreville, in Appanoose county, Iowa.

"And defendant avers that afterward, to wit, January, 1868, said two last mentioned companies duly selected, located, and established said point near Upton as the point of intersection and connection of the lines of said companies, thus forming a continuous line of projected railway from Alexandria, Missouri, by way of said town of Upton, to Bloomfield, Davis county; thence west to the Missouri river as aforesaid; and thereupon said companies proceeded to construct said line of railway on said route as aforesaid, no part thereof being in said county of Schuyler.

"And afterwards, to wit, in the year 1870, said Alexandria and Nebraska City Railway Company and said Iowa Southern Railway Company entered into articles of consolidation for the purpose of constructing said line of railroad between said points and on said route last aforesaid. Defendant avers that no part of said consolidated line is within Schuyler county. All of which facts plaintiff well knew at the time he claims to have purchased the bond and coupon sued upon.

"The defendant avers that in the year 1871, prior to the 1st day of September in that year, the county of Schuyler made a subscription to the capital stock of the said Missouri, Iowa, and Nebraska Railway Company in the sum of one hundred and fifty thousand dollars, but defendant says that it was made by said court on its own mere motion, and without the assent of two-thirds of the qualified voters of Schuyler county, and also without the assent of a majority of said qualified voters, no election, regular or special, having been held in said county whereby to obtain such assent; wherefore defendant says that said subscription was unauthorized, null, and void."

2. The third plea further avers that the Alexandria and Nebraska City Company in the year 1866, adopted the second section of the act amendatory of the original charter, which authorized said railroad company "to *extend* said road from a point at or near Luray in Clarke county, Missouri, to Nebraska City in Nebraska Territory, on the most practicable and direct route by way of or near Rockport, in Atchison county, Missouri." And it is further averred that under this authority the Missouri, Iowa and Nebraska Rail-

way Company *in October*, 1871, "located an extension of the line of its railway from Luray, in Clarke county, Missouri, thence west by way of Memphis, in Scotland county, through the county of Schuyler, to the town of Centerville, Appanoose county, Iowa."

In this plea as well as in the sixth, it is distinctly averred that no part of the route of the Alexandria and Bloomfield road was within Schuyler county, and that the route through that county was adopted by the Missouri, Iowa and Nebraska Railroad Company by authority of the act of *February* 19, 1866, authorizing an *extension* of the original route into counties not penetrated by the road authorized by the original charter.

By the agreement of parties, the court ordered that a map "showing of Clarke and other counties and towns of Alexandria, Luray, Upton, Bloomfield, Lancaster and Centerville," be made part of the record. Of this map I will speak in the argument.

Brief.

I.

An examination of the allegations of the answer demurred to, and of the certificate of division signed by the judges, will show beyond question that no part of the route of the Alexandria and Bloomfield Railroad was within the county of Schuyler.

Such being the fact, I maintain that the county of Schuyler had no power to subscribe to the stock of that company without a vote by the people. And unless the county could have subscribed to the stock of that company, it had no power to subscribe to the stock of the consolidated company, which possessed in this respect only the "privileges and immunities" of the parent corporation.

In the recent case of county of Scotland *vs.* Thomas,

(4 Otto, 682,) this Court held that Scotland county had the power to subscribe to the stock of the said Missouri, Iowa, and Nebraska Railway Company. Between that case and this there is a radical difference. The ground upon which Scotland county was held liable was thus stated:

"The power to make the subscription was conferred in 1857, in the charter of the company called the Alexandria and Bloomfield Railroad Company, before the constitution was adopted: and this company, by consolidation with other companies, formed the Missouri, Iowa, and Nebraska Railway Company, and *brought to it all its corporate privileges and powers*, and amongst the rest that of receiving county subscriptions to its capital stock." (P. 688.)

The power to make the subscription in controversy now was *not* conferred upon the original company, *because no part of the route of that company's railroad was within Schuyler county.*

I concede for the sake of this argument that the consolidated company had all the privileges and immunities of the parent corporation—no more, no less. I concede that *certain counties* in Missouri had the right to take stock in said original and also in said consolidated corporation, but I deny that Schuyler county was one of them.

It is clear that the constitution of 1865 prohibited this subscription unless it was authorized by pre-existing legislation.

II.

I therefore ask the Court's attention to the single question, whether, assuming the truth of the allegations of the answer demurred to, the right to subscribe to the stock of the Alexandria and Bloomfield Railroad Company existed in the county of Schuyler, prior to July 4th, 1865, when the constitution went into operation.

The power of the county, whatever it was, to subscribe,

was derived from the 14th section of the North Missouri Railroad Company's charter which was made part of the charter of the Alexandria and Bloomfield Railroad Company, and which is as follows:

"It shall be lawful for the county court of any county *in which any part of the route of said railroad may be* to subscribe to the stock of said company," &c.

This authorized counties into which the railroad had been built or projected, to subscribe, but it did not authorize any other counties to do so.

It was only counties "*in which any part of the route of said railroad may have been*," that could subscribe.

The power to subscribe was given in plain words to "any county in which any part of the route of said railroad may be," and to no other.

The Legislature of Missouri chartered the Alexandria and Bloomfield Railroad Company, and by the terms of the charter defined the route over which it should pass in these words:

"A railroad from the city of Alexandria, in the county of Clarke, in the direction of Bloomfield, in the State of Iowa, to such a point on the northern boundary line of the State of Missouri as shall be agreed upon by said company, and a company authorized on the part of the said State of Iowa to construct a railroad to intersect the road authorized to be constructed by the provisions of this act at the most practicable point on said State line."

The counts of the answer demurred to, and which are to be taken as true, distinctly aver "that no part of said route was within the county of Schuyler."

Could the county court of Schuyler county lawfully subscribe to the stock of a railroad when no part of its route was within the limits of the county? If so, what did the Legislature mean by limiting the power to roads being within the county? The language of the charter was em-

ployed for a purpose, and is plain and unmistakable. It was intended to prevent subscriptions by counties off the line. I suppose it must be plain that all the counties in Missouri were not authorized to subscribe to the capital stock of this company. If not all—then what portion of said counties had such power? Plainly those, and only those, "in which any part of the *route* of said railroad may be." But this proposition is too plain for argument, and I only dwell upon it because of its importance in this case. The power to subscribe to the consolidated company is claimed upon the ground that there was a right to subscribe to the parent company, prior to the adoption of the constitution of 1865. If this right to subscribe to the parent company did not exist before the adoption of the constitution, then of course no right to subscribe to the stock of the consolidated company can be maintained. The new company acquired in this respect only the rights of the old. If a subscription by Schuyler county to the old company made prior to July, 1865, would have been void, then the subscription to the new company is likewise void.

III.

It was not possible to locate the route of the original company so that any part of it would have been in Schuyler county without violating the charter. By the charter the route was to start at Alexandria, Clarke county, Missouri, and run "*in the direction of Bloomfield, in the State of Iowa*, to such point on the northern boundary line of the State of Missouri as shall be agreed upon by said company and a company authorized on the part of the State of Iowa to connect" with the road chartered.

This route was clearly defined. Three things in relation to it were definitely fixed:

1. Its starting point was Alexandria, Mo.

2. Its course was in the direction of Bloomfield, Iowa.

3. Its terminus was a point on the northern boundary line of Missouri, to be reached by a line starting at Alexandria and running "in the direction of Bloomfield."

This terminus was not precisely fixed, but it was fixed with precision enough so that it could not vary very much from a given point. It was to be in the direction of Bloomfield, Iowa, from Alexandria, Missouri. That much was settled. It was also to be at a point to be agreed upon between the Missouri company and a railroad company to be organized in Iowa. When this agreement was made and the point of junction fixed, the only element of uncertainty was removed.

The record, and especially the map which is made part of the record, shows that a line running from Alexandria to the State line, "in the direction of Bloomfield, Iowa," could not by possibility touch the county of Schuyler. By reference to the map it will be seen that Upton is a town on the State line exactly in the direction of Bloomfield from Alexandria. In strict conformity with the charter, this town of Upton was designated and fixed as the terminus of the Alexandria and Bloomfield road. Upton is twenty-one miles east of the easterly extremity of Schuyler county. (See statement on map.) Since Upton is exactly in the direction of Bloomfield, and therefore the proper terminus in law as well as in fact of the original route, it certainly requires no argument to show that if the terminus had been fixed in Schuyler county, 21 miles to the eastward of Upton, it would not have been in the direction of Bloomfield, but entirely outside of the limits fixed by the charter, and therefore unauthorized and unlawful.

For the convenience of the Court I submit herewith copies of the map in evidence, showing in a distinct red line the route of the Alexandria and Bloomfield railroad as defined by its charter, and as actually located prior to, and at the time of the adoption of the constitution of 1865, and in a distinct blue line the extension of the route from

Luray through Scotland and Schuyler counties, Missouri, and Appanoose county, Iowa, to Centerville, which extension, as we have seen, was authorized by an amendment to the charter passed in 1866, after the adoption of the constitution. The most direct practicable route was contemplated by the charter. (R. R. Co. *vs.* R. R. Co., 3 Ind., p. 464.)

IV.

Not only did the charter fix the original route so that it did not and could not lawfully touch Schuyler county, but the route, as actually laid out and established by the original company, did not touch that county.

The averments of the answer which are demurred to and admitted show that the entire route was located; that Upton, on the State line, was selected and agreed upon as the terminus of the Missouri company, and the point of intersection of the Missouri road with the Iowa road; that the right of way was obtained; that the road was partly constructed upon this route.

If it were true that a discretion as to selecting a route was left to the company, which might have been exercised in locating the route elsewhere, when the power of locating was once fully exercised it was exhausted. When the route was selected, and the terminal point on the State line fixed at or near Upton, that became as much the line and terminus as if fixed absolutely in the charter.

Redfield on Railways, 5th Ed., p. 410.
Railroad Co. *vs.* Naylor, 2 Ohio, (N. S.,) 235.
Brigham *vs.* Railroad Co., 1 Allen, 317, 318.
Neal *vs.* Railroad Co., Grant's Cases, (Pa.,) 137.
Works *vs.* Junction R. R. Co., 5 McLean, 425.
Morehead *vs.* R. R. Co., 17 Ohio, 340.
State *vs.* Turnpike Co., 10 Conn., 157.
Hartford, &c., Society *vs.* Hosmer, 12 Conn., 360.
Turnpike Co. *vs.* Turnpike Co., 2 Swann, (Tenn.,) 282.
Railroad Co. *vs.* Pottle, 23 Barbour, 21.

These cases, and many others, distinctly hold that when the power of location is once exercised it is exhausted, and a relocation or change of location cannot be subsequently made without a new grant of power. But even if a variation in their original route could be held valid under the charter, it would not in the least affect this case, because here the old route was not changed or varied, but a new road called an *extension* of the route *was* authorized, and this extension penetrates territory into which the original route did not and could not extend.

V.

And this brings me to another important point. The parent corporation and the Legislature of Missouri concurred in the opinion that this extension through Schuyler county was not authorized by the original charter, and therefore an amendment of the charter was passed in 1866, to authorize the extension. This amendment was in these words:

"That said railroad company may *extend* said road from a point at or near Luray, in Clarke county, Missouri, to Nebraska city, in Nebraska Territory, on the most practicable and direct route, by way of or near Rockport, in Atchison county, Missouri."

(Act of February 19th, 1866, amending charter of Alexandria and Bloomfield Railroad Company.)

The route of the parent company never was changed. It remains to-day as fixed by the original charter, but an *extension* of it—*a branch*—was authorized by the amendment of the charter above quoted.

If this extension was authorized by the original charter, why was this amendment deemed necessary? Schuyler county was not on the original route as it existed by the original charter, because no part of Schuyler county was touched by a route running from Alexandria to the State

line "in the direction of Bloomfield." Hence the amendment of the charter to authorize the extension of a branch of the route from Luray west through Schuyler county. Surely it cannot be seriously claimed that the extension through Schuyler county was authorized by the original charter, or that any part of the route was, or could lawfully have been, in that county; and if the original route did not touch Schuyler county, and if it was necessary to amend the charter before the road could be extended into its territory, how can it be maintained that the original or parent company had the privilege of receiving a subscription from that county, which privilege passed to the consolidated company? The plaintiff must establish first of all, that before the constitution took effect, the county of Schuyler had power to subscribe to the parent corporation without a vote by the people. Failing to establish this he fails altogether; for surely the new company has no privilege not derived from the old, and it could not derive from the old company a privilege it did not possess.

It is perfectly clear that no latitude of construction could have authorized the location of the route of the Alexandria and Bloomfield road into any part of Schuyler county. I refer to the map which is made part of the record and to the following authorities:

The most direct practicable route must be followed. (Railroad Co. *vs.* Railroad Co., 3 Ind., 464.)

A deviation from the route described in the charter will be enjoined. (Stevens *vs.* R.R. Co., 29 Vermont, 545.)

The company in locating its route can exercise only such discretion "as is incident to an ordinary practical survey, but not deviating substantially from the *course and direction indicated by the charter*." (Railroad Co. *vs.* Stoddard, 6 Minn., 150.)

The power of location "is to be exercised in a reasonable and proper manner and in conformity to the clear and man-

ifest purpose of the legislature as developed in the provisions of the charter." (1 Allen, Mass., p. 318.)

VI.

The parent corporation had the right to receive subscriptions only from counties through which its route ran. Its route did not run through or into Schuyler county.

I do not know how I can make more plain the language of the charter already quoted. The question is what counties had the right to subscribe to that corporation? The charter answers, "any county in which any part of said railroad may be."

This identical language was before this Court for consideration in County of Calloway *vs.* Foster, 3 Otto, 572–3–4, and the court held that if used with reference to a "railroad already built it would no doubt refer to the presence or existence there of the road." When used with reference to a road not yet built and not located or surveyed, the court said: "a broad construction of the language would be to say that it meant to authorize a subscription by any county in which the road may *by law be located*. * * * *

It might be held to authorize a subscription to any county in which the road may be in fact actually located." In that case the subscription was held valid on the ground "that upon any reasonable construction of the language it embraces the county of Calloway, which was one of the possible sites, and a site ultimately occupied, in fact." "We find," said the court, (p. 572,) "no difficulty, therefore, in holding that a county, *included in the terms of the original act*, had power upon its own authority to subscribe for stock," &c. It is, I am sure, equally clear that a county *not* included in the terms of the original act, cannot subscribe after the adoption of the constitution, without a vote of the people as required thereby.

Again, the language above quoted was construed by the

supreme court of Missouri, in the State *vs.* Saline County Court, (51 Mo., 350,) and the law was settled for that State as follows: (I quote from page 373.)

"The power, therefore, given to subscribe is not to the counties upon the line of any railroad that may be constructed by the *corporation thereby created*, but to the counties upon the 'route of said railroad' as thereby authorized; that is, on the route of the railroad as provided for and designated in the thirty-fifth section of the original charter. The Legislature might, by an amendment afterwards, allow an extension of that railroad, or branches to that road, *but those counties on the line of the extension or branches could not be on the line of 'the route of said railroad' as originally designated.*"

Let it be supposed that an attempt had been made *without an amendment of the charter of the original corporation*, to extend its route through Schuyler county: who can doubt that such action would have been enjoined as in violation of the charter?

VII.

Having now shown that the county of Schuyler did not possess power to subscribe to the original corporation when the new constitution took effect (July, 1865) it only remains for me to show that the act of 1866 amending the charter so as to extend the route through that county did not confer any such power. Upon this subject my proposition is as follows:

Since Schuyler county was not on the route as designated in the original charter, said county was bound by the prohibition contained in the constitution, and was not authorized by the provisions of the charter to subscribe to the stock of the company without submitting the question to a vote of the people. To hold otherwise would be to give to that county powers prohibited by the constitution, which it did not possess at the time of its adoption. This is clear,

both upon authority and reason. By the decision of the supreme court of Missouri, in State *vs.* Saline County, already cited, this exact question was settled so far as the State courts are concerned, and that decision is one which, according to a well-settled rule, should be followed here. The railroad charter considered in that case was adopted before the new constitution, and conferred power to subscribe upon "the county court of any county in which any part of the route of said railroad may be," being, in that respect, word for word with the original charter now under consideration. The route fixed in the original charter in that case was "from Louisiana, in the county of Pike, by way of Bowling Green in said county to some suitable point on the North Missouri Railroad" between Wellsburg and Mexico, "thence to the Missouri river, at the most eligible point, on a line the most suitable and advantageous." (51 Mo., 372.)

In 1868 (after the constitution) the Legislature passed an act amending the charter, and authorizing the extension of the road to a point beyond the Missouri river, through counties south of the river, and not on the route of the road as originally chartered.

It will be seen that the Saline County case is in all respects completely analogous to the one at bar. In deciding it the supreme court of Missouri said:

"But if the original charter did not confer power upon Saline county to subscribe, it is contended that such a power is found by virtue of what is claimed to be an amendment of this railroad charter, passed in 1868, extending and changing the route of the railroad; that such an extension and change of the route is but an amendment to the original charter, which it was entirely competent for the Legislature to make since the adoption of the new constitution prohibiting the granting of special charters, as was held by this court in the case of State at the relation of Circuit Attorney *vs.* The Cape Girardeau and State Line Railroad, 48 Mo., 468.

"If it is conceded that this act of 24th March, 1868, was a perfectly valid and legal amendment to the original charter of the company, does it produce the result proposed? The power of the county court of Saline county to subscribe for the stock of this company, if it exists, must be derived *from the power given in the original charter*, no substantive grant of power after the new constitution took effect being possible.

"How, then, stands the case? The power given by the charter, of subscription by the county court, is in these words: 'It shall be lawful for the county court of any county in which any part of the route of said railroad may be to subscribe,' &c.

"The power, therefore, given to subscribe is not to the counties upon the line of any railroad that may be constructed by the *corporation thereby created*, but to the counties upon 'the route of said railroad,' as thereby authorized; that is, on the *route* of the railroad *as provided for and designated in the 35th section of the original charter*.

"The Legislature might, by amendment afterwards, allow an *extension* of that railroad, or branches to that road, but those counties on the line of the extension or branches could not be on the line of 'the route of said railroad,' as originally designated.

"There is another objection to the power here claimed, (conceding this to be a valid amendment,) which is equally fatal. If the power to subscribe, as originally granted, had been a general one, and not confined to the route marked out by the charter, yet, as at the adoption of the constitution there had been no change of the route, the power of subscription was confined to the counties on the designated route, and they could subscribe without submission to the qualified voters after the taking effect of the new constitution, because at the taking effect the power already existed. But because, after the adoption of the constitution, the Legislature can amend the charter by extending the route, does that give a power of subscription on the line of the extension which they did not, at the time of the adoption of the constitution, have? This is the effect claimed for it, and the result would be the conferring upon counties *of a power prohibited after the adoption of the constitution, which they did not* possess at its adoption."

And Judge Wagner, while dissenting upon other points concurred as to this, and said:

"Judge Wagner dissents as to the right of the State to maintain the form of proceeding, and as to holding the act of 1868 void; but concurs in the remainder of the opinion that the original charter only authorized the company to construct the road to the Missouri river, and that the act of 1868 *could not* invest the county court of Saline county with power to subscribe the stock *without being first authorized so to do by a vote of the people*."

This court has considered several cases in which the question was as to the effect of an amendment of a Missouri railroad charter, after the constitution, upon county subscriptions authorized before the constitution.

Harshman *vs.* Bates Co., 2 Otto, 569.
County of Calloway *vs.* Foster, 3 Ib., 567.
Thomas *vs.* Scotland Co., 4 Ib., 682.

In all these cases the inquiry was, *first*, whether prior to the taking effect of the constitution, the county had power to subscribe to the parent corporation; and this being answered in the affirmative, the court considered whether the right was subsequently lost. I assert with perfect confidence that the right to subscribe to the new company in such cases has uniformly been predicated upon a right to subscribe to the *old* company, existing when the constitution was adopted.

Thus in the Calloway County case the court said: "We find no difficulty therefore in holding that a county *included in the terms of the original act* had power, &c." And again, "The power of this court to subscribe *as one of the counties intended to be included within the terms of the original act is reasonably plain*." (3 Otto, 572.)

In the Scotland County case the record showed that the route of the old company, as well as that of the new, was within that county. After stating that the county contested

the validity of the bonds on the ground that the question had never been submitted to the people, the court say:

"The plaintiff answers this objection by showing that *the power to make the subscription was conferred, in* 1857, *in the charter of a company called the Alexandria and Bloomfield Railroad Company* before the constitution was adopted, and that this company, by consolidation with other companies, formed the Missouri, Iowa, and Nebraska Railroad Company, and brought to it all its own privileges and powers, and amongst others that of receiving subscriptions to its capital stock."

It was assumed that the county of Scotland had the power to subscribe to the original company, and the question, and the only question, was as to the effect of the consolidation upon that power.

The Missouri cases cited in the Scotland County case simply hold that if the power was given by the charter prior to the constitution it was not taken away by the constitution. They are perfectly consistent with the Saline County case, above quoted, in which it was held that *because* the power to subscribe did not exist prior to the constitution it could not be subsequently exercised without a vote of the people as required by the constitution.

VIII.

The plaintiff has by his declaration substantially admitted that he is bound to show that the original route was within Schuyler county, for he avers as follows:

"The plaintiff further states that a part of the route of said Alexandria and Bloomfield Railroad Company's railroad was within the said county of Schuyler, *as the same is defined in the said act incorporating said company.*" (Record, p. 2.)

Plaintiff evidently felt that this was a necessary and material allegation, as it undoubtedly is. He was quite right

in assuming that it must be proved in order to entitle him to a recovery.

IX.

It is not necessary to allege or prove notice to the bond purchaser of the want of power in the county to subscribe.

1. Where the defense is that there was an absolute want of power, and that defense is established, the bonds are void even in the hands of a purchaser without notice.

Marsh *vs.* Fulton Co., 10 Wall., 676.
Harshman *vs.* Bates Co., 2 Otto, 569.

2. But the plaintiff had notice.

The bonds on their face show that they were issued in payment "for subscription to the stock of the Missouri, Iowa, and Nebraska Railway Company," as authorized by an act of the General Assembly of the State of Missouri, entitled "An Act to incorporate the Alexandria and Bloomfield Railroad Company, approved February 9, 1857."

A purchaser of the bonds in question with this recital printed as it is, in the body of each one of them is put upon his inquiry, and must be held to have notice of the want of power.

(*a.*) Such purchaser was by the bonds informed that the authority to issue them was claimed under the Alexandria and Bloomfield Railroad charter.

(*b.*) That charter makes no mention of the Missouri, Iowa, and Nebraska Company, to which the bonds were issued, and does not require a vote of the people, hence he is put upon full inquiry as to the ground upon which the county claimed the power to issue, since on the face of the bonds *such power did not seem to exist at all.*

(*c.*) The charter, however, did inform the bond purchaser

distinctly that subscriptions to the stock of said company were authorized to be made only by "the county court of any county in which any part of the route of said road may be," and of course it was incumbent on him to inquire whether Schuyler county was one of the counties here designated and described.

(*d.*) He was bound to know that the bonds were issued without a vote of the people, after the adoption of the new constitution, and therefore he was put upon inquiry as to whether the power was perfect before the constitution was adopted.

In Marsh *vs.* Fulton County it was settled that want of power in the county to subscribe for lack of a vote of the people, was a defect so fatal that the bonds could not be ratified except the ratification be authorized by a vote of the people.

The ruling in this case is, that where the act is *ultra vires*, for want of a vote of the people, there can be no ratification, except that which is authorized by the people; the defect being one of power. Said the court by Field, Judge: "They (the supervisors) could not, therefore, ratify a subscription without a vote of the county, because they could not make a subscription in the first instance without such authorization."

3. Notice is, however, distinctly charged in all the pleas demurred to, except the sixth. For the reasons above stated the sixth plea is perfectly good without alleging notice.

X.

I call attention to the fact that the point on the State line near Upton was fixed as the terminus of the Alexandria and Bloomfield Railroad, by agreement with the Iowa com-

pany *made in* 1868, in pursuance of the original charter. (See Record, p. 19.) Thus the route stood when the subscription was made by Schuyler county, prior to September 1st, 1871. (Record, p. 20.) The extension or branch authorized by the act of February 19, 1866, was not actually located until October, 1871, several months *after* the subscription. (Record, p. 20.)

When therefore Schuyler county undertook to subscribe, the route of the original corporation, as fixed by the charter, by actual survey and location, and by agreement with the Iowa Company, was from Alexandria to the State line near Upton. An extension from Luray westward had been authorized by an act passed subsequently to the adoption of the new constitution, but it had not been located. This extension was treated by the law and by the parties interested, not as a part of the original route, but as a new and different route which could not have been adopted but for the additional legislation which authorized it. Surely I am warranted by these facts, and the other considerations above mentioned, in claiming that in July, 1865, when the new constitution came into force, Schuyler county did not have the right to subscribe to the original corporation, because no part of the route of its railroad was within said county, either in law or in fact.

I have, as a matter of convenience, discussed the demurrer to the answer rather than the numerous questions upon which the judges of the circuit court differed in opinion. The argument is the same in either case, and I have tried to confine myself to points that are vital to the question at issue.

Respectfully submitted:

GEO. W. MCCRARY,
Counsel for Plaintiff in Error.

NOTE.—I ask the Court's attention to the following statutory provisions to which my attention was called after the foregoing was in print:—

General Railroad Incorporation Act of 1853, sec. 23 (acts of 1853, p. 133); also sec. 56 of same act which makes it applicable to companies organized under special charters.

General Statutes of Missouri, 1866, page 337, sec. 13, and page 343, sec. 48.

Laws of Missouri, 1869, page 74.

These statutes settle the pivotal point in this case inasmuch as they forbid any change of route, unless it appears to have been ordered for the purposes designated in the act, or some one of them (which does not appear here), and by a two-thirds vote of the Directors, which is not alleged. But more conclusive still is the provision which prohibits any change in the "general route *or termini*" even after such vote of the Directors. I think, after examining these provisions, the Court can have no doubt that the route through Schuyler County was necessarily authorized by the act of 1866, and not by any law in force prior to the Constitution. Most assuredly the *terminus* was fixed at Upton, and the route could not be extended into Schuyler County without changing the terminus. Hence legislation was necessary.

G. W. M.

Supreme Court of the United States.

No. 62.

THE COUNTY OF SCHUYLER, PLAINTIFF IN ERROR,

vs.

JOSEPH L. THOMAS, DEFENDANT IN ERROR.

Error to the Circuit Court United States, Eastern District of Missouri.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

A reference to the statement of this case, found on pages 1 to 6 of original brief, will show that the material facts are as follows:

1. On the 9th of February, 1857, the Alexandria and Bloomfield Railroad Company was incorporated by an act of the Legislature of Missouri.

2. By virtue of the 10th section of its charter said company possessed the privileges of the North Missouri Railroad Company, one of which was the right to receive subscriptions from "the county court of any county *in which any part of the route of said road may be.*"

3. The *route* of the road to be constructed by said company, was "from the city of Alexandria in the county

of Clark, *in the direction of Bloomfield in the State of Iowa*" to a point on the north line of the State of Missouri to be agreed upon by said company and an Iowa company with whose line it was to join.

4. That said route was, in strict compliance with the charter, located, fixed, and established, and as thus fixed it ran from Alexandria, Missouri, by way of Luray, to the State line at Upton.

5. That no part of said route was in the county of Schuyler.

6. That while the route was thus fixed, and before any branch road was authorized, the constitution of 1865 was adopted, which prohibited all future subscriptions by counties to railroad companies without a vote of the people authorizing it.

7. That long after the taking effect of said Constitution, the charter of said company was amended so as to authorize an extension—or a branch—of said road from Luray, Missouri, to Nebraska City, Nebraska. This extension or branch runs through Schuyler county.

8. That after said branch or extension was authorized, said company was consolidated with the Iowa Southern Railway Company, and the name was changed to the Missouri, Iowa and Nebraska Railroad Company.

9. That six years after the adoption of said constitution, and about five years after the amendment of the charter authorizing the extension or branch, the county of Schuyler undertook to subscribe to the stock of the said Missouri, Iowa, and Nebraska Railroad Company without a vote of the people.

All these facts clearly appear upon the face of the answer, which was demurred to and admitted. Upon them, I confidently submit the following legal propositions:

1. If Schuyler county possessed power to subscribe to the stock of the said Missouri, Iowa and Nebraska Railroad Company, it must have been by virtue of legislation anterior to July 4th, 1865, the day upon which the constitution took effect.

2. The constitution prohibited any legislation to confer such power after it came into force, and therefore the sole question is whether the power existed, and could have been lawfully exercised under the law, and fact, as they stood, prior to that time.

3. This Court said in the Scotland County case (4 Otto, 682) that "the power of the counties to subscribe being thus held to be a right and privilege of the company, in our opinion passed, with its other rights and privileges, into the new conditions of existence which the company assumed under the consolidation." This is readily granted, but it does not apply to this case. What counties are referred to when the Court says "the power of the counties to subscribe"? Undoubtedly the counties which had that power under the charter. Not all the counties in the State of Missouri; not an indefinite and uncertain number of counties, but clearly the counties mentioned and described in the charter itself, to wit, "any county in which any part of the route of said railroad may be."

5. For argument's sake let it be conceded that the county of Schuyler had the same right to subscribe in 1871, that it possessed when the constitution took effect in 1865, and that the intermediate legislation neither enlarged nor de-

minished the power, and what follows? Simply that in order to hold this subscription valid the Court must decide that the county had power under the original charter of the company to subscribe to the stock of a railroad company, *no* part of whose track was within the county. If we concede that the consolidated company under the new name succeeded to the privileges of the old, it still follows that, it did not succeed to the privilege of receiving a subscription from Schuyler county, because that was not a privilege of of the old company.

6. That there was no power in Schuyler county to subscribe to the parent company is perfectly clear, not only from the consideration that no part of the line of its railroad was within said county, but from the following additional reasons:

(*a.*) The route had been finally located according to the charter, and passed through only the counties of Clark and Scotland.

(*b.*) There was no power outside of the legislature to authorize a new route, a branch route, or an extension into or through Schuyler county, and when the constitution was adopted and took effect the legislature had not acted.

(*c.*) Because there was no power in the company to change the route so as to touch Schuyler county. The legislature in 1866, was appealed to, and did authorize a branch from Luray west through Schuyler county.

(*d.*) Prior to said legislation in 1866, the company had no right to build into Schuyler county. This was the situation July 4, 1865, when the constitution took effect.

(*e.*) If then, Schuyler county had on the 4th of July, 1865, when the constitution came into force, attempted to subscribe to the stock of the ~~present~~ parent company, it could have been shown in opposition to such subscription: *first*, that

no part of the route of the road was in said county, (of itself a perfectly conclusive objection,) and *secondly*, that on that day, the company had no right to build a road into said county.

7. The right to construct this railroad through Schuyler county is derived, not from the original charter, but from the act of 1866, and that act did not confer upon the county any power to subscribe otherwise than after a vote of the people, and in accordance with the constitution.

8. The road through Schuyler county having been authorized by legislation subsequent to the adoption of the constitution, a subscription by that county could only be made after a vote of the people; power to subscribe to the original road was not power to subscribe to the extended or branch route. It was so held as already shown in the Saline county case, by the supreme court of Missouri. (51 Mo., 372.)

9. There is no conflict between the decision in the Saline county case and that in the Green county case, (54 Mo., 540.) cited and followed in the Henry county case, (5 Otto, 619.) In the two last mentioned cases the branches were held to have been authorized by legislation anterior to the adoption of the constitution. Thus in the Henry county case the original charter itself, passed in 1860, provided for the main line and for "branch railroads into and through any counties that the directors may deem advisable." (5 Otto, 620.)

And with regard to the branch road, considered in the Green county case, the Court said:

"This branch road commences and ends in the same places designated *for the branch road* in the original charter. It proposes nothing but what was intended to be accomplished by the act creating it, and its union with another company is in the name only; no new powers are granted

to either the branch or the company with which it is consolidated and no original powers are taken away."

And in stating the case Judge Wagner distinctly says that, under the original charter, "the same railroad Company was authorized to construct a branch railroad," &c., (p. 544.)

It appears, then, that in both the cases in which a subscription, made after the constitution, to a branch road without a vote of the people, was held valid, it was upon the ground that the branch road was provided for in the original charter, *i. e.*, by legislation anterior to the adoption of the constitution. And in a case where, as in the present one, the branch was authorized, not by the original charter nor by legislation anterior to the constitution, but only by an act passed after the constitution, the Supreme Court held the subscription void. All I ask is that this Court will follow the decision of the supreme court of Missouri upon this point—a decision giving a construction to the constitution and laws of the State, and, therefore, one which this Court should adopt. (See Original Argument, pp. 16, 17, and 18.)

These several propositions are supported by the authorities cited and reasons submitted in the original argument. They are submitted here and in this form for the sake of greater clearness.

In addition to the foregoing, I desire now to call the Court's attention to a point not made in the original brief. The subscription in question was prohibited by section 2 of an act of the General Assembly of Missouri, approved March 23, 1861, and which is as follows:

"*It shall not be lawful* for the county court of any county to subscribe to the capital stock of *any railroad company* unless the same has been voted for by a majority of the resi-

dent voters who shall vote at such election under the provisions of this act." (Sess. acts 1860–61, p. 60, Sec. 2.)

This section was for the first time discussed and construed by the supreme court of Missouri in the recent case of State *ex rel.*, &c., *vs.* Garroutte, April term, 1878, (see Central Law Journal (St. Louis) of July 12, 1878.) The decision of that court is, that said act prohibited "such subscription, after its passage, without such vote (of the people) to any railroad company, whether it had a pre-existing charter authorizing a subscription by counties or not." Upon this authoritative construction of the State statute by the State supreme court I rely. If it were necessary to consider the soundness of the construction here given to the statute, that construction would be found in harmony with authority and reason. True the 14th section of article 11 of the constitution of Missouri, already quoted, has been held by the same court, as well as by this Court, as not affecting the subsequent exercise by counties of the power to subscribe previously existing. But mark the difference between the constitutional provision and this statute. The former prohibits the General Assembly from authorizing such subscription except after a vote of the people. This only operated upon the Legislature, and controlled subsequent action by that body. It was, therefore, with great reason held to be purely prospective and not retroactive. But the statute in question operates upon the people and upon corporations, and absolutely *prohibits* from its date all such subscriptions without a popular vote. It declares that it shall not be lawful for the county court of *any county* to subscribe to the capital stock of *any railroad company*, &c. This by the very force of plain words necessarily applies to *all* counties and to *all* railroad companies within the State, and repeals all acts previously in force which authorized the thing by that act prohibited.

I abstain from further discussion of this point, and content myself with a reference to the reasoning of the supreme court of Missouri, which seems to me unanswerable as well as authoritative, and to the note accompanying that opinion to be found in the Law Journal above mentioned, pp. 35, 36 and 37.

Respectfully submitted,

GEO. W. MCCRARY,
For Plaintiff in Error.

Supreme Court of the United States.

No. 62.

THE COUNTY OF SCHUYLER

vs.

JOSEPH T. THOMAS.

I desire, with the Court's indulgence, to present more fully two points which, upon reflection, I am sure are of sufficient importance to require more attention than I have given them.

They are, as follows:

1. The statutes of Missouri, in force when the constitution of 1865 took effect, so far from authorizing, expressly prohibited any change of the general route or of the terminus of the Alexandria and Bloomfield Railroad, as then laid out, surveyed, and located.

2. The act of 1861, quoted in supplemental brief, applied to and modified the charter of the Alexandria and Bloomfield Company, and therefore prohibited the subscription in question without a vote of the people.

If I establish these propositions, or either of them, it will follow, independently of other questions, that Schuyler county did not possess power to subscribe to the stock of the original company, when the constitution was adopted, and therefore, of course, had no power to subscribe to the

consolidated company. I shall clearly establish both propositions.

I.

Was the Alexandria and Bloomfield Company prohibited from so changing its route as to run through Schuyler county?

I have already shown, I think conclusively, that because there was no such power given in the charter it was not conferred, and that the power to locate was power to locate only once, and when exercised was exhausted. But I go further now, and assert that the law prohibited the change in question.

It is first to be noted that the provisions of the general (railroad) incorporation act of Missouri, of 1853, and of 1866, were made applicable to all companies chartered by special acts.

Thus section 56, of the General Act of 1853, (statutes of 1853, p. 144,) provides:

"All existing railroad corporations within this State, *and such as now or may be hereafter chartered*, shall respectively have and possess all the powers and privileges contained in this act; and they shall be subject to all the duties, liabilities and provisions not inconsistent with the provisions of their charter, contained in sections 9, 13, 14, 15, 16, 17, 18, 19, 20, 21, **23**, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52 and 53, of this act."

And the same language is embodied in substance in the General Act of 1866. (See section 48, page 343, General Statutes of Missouri, 1866.)

The provisions of these statutes, relating to a change of route by railroad companies, therefore, entered into and became a part of the charter of every railroad. Those provisions are as follows. Section 23, of the said act of 1853, (p. 133,) provides:

"The directors of any company under this [act] may, *by a vote of two-thirds of their whole number*, at any time alter or change the route or any part of the route of their road, if it shall appear to them that the line can be improved thereby; and they shall make and file in the clerk's office of the proper county, a survey, map and certificate of such alteration or change, and shall have the same right and power to acquire title to any lands required for the purposes of the company, in such altered or changed route, as if the road had been located there in the first instance; and no such alteration shall be made in any city or town, after the road shall have been constructed, unless the same is sanctioned by a vote of two-thirds of the common council of said city, or trustees of said town; and in case of any alteration made in the route of any railroad after the company has commenced grading, compensation shall be made to all persons for injury so done to any lands that may have been donated to the company. All the provisions of this act relative to the first location and to acquiring title to land, shall apply to every such new or altered portion of the route."

Section 13, of the said act of 1866, modifies the foregoing materially, and provides, as follows: (P. 337.)

"The directors of any company under this chapter may, *by a vote of two-thirds of their whole number*, at any time change the road bed or road line, or any part thereof, for the purpose of shortening the line or to overcome natural objections thereto; *but nothing in this section shall authorize said company to change the general route or terminus of said road or any part thereof.*"

Thus the law stood when the constitution was adopted; but prior to the location of the route through Schuyler county a further amendment was adopted. (Acts of 1869, p. 74.) Whether this latter act is to be considered or not is quite immaterial. I cite it merely to say that if applicable it will be found to contain all the provisions of its predecessors, upon which I rely, and to direct especial attention to the following provision contain therein:

"But nothing contained in this act shall be so construed as to authorize such company *to change the general route of their line or road-bed, or to avoid running their road through any point named in the original articles of association, or either terminus named therein, or to change the last established terminus, except by extension of their road as aforesaid.*"

The "extension" here referred to is defined in the same act as an extension of the "line or road-bed *from either terminus* named in their original charter to such other point as shall be named in such proceedings of such company."

This act was passed after the Alexandria and Bloomfield Company was organized, but before the consolidation, and before the route through Schuyler county was established.

There is surely no difficulty about the construction of these statutes. They are to be construed strictly; but whether strictly or liberally, the result is the same. Several points are too clear for argument.

(*a.*) No change of route was possible unless ordered by a vote of two-thirds of the directors. Are we to *presume* that there was such a vote? I think not in any case, but clearly not in this case, because the answer, which by the demurrer is admitted, avers that the new route was adopted by authority of the act of 1866. (Record, p. 12.) It is not claimed that it was by virtue of the charter, much less by virtue of a two-thirds vote of the directory.

(*b.*) No change of route was possible, even if ordered by two-thirds of the directors, unless made for certain specific purposes, as, for example, (1) to shorten the line, or (2) to overcome natural objections to the route, or, under the act of 1869, (3) to secure economy in the construction. None of these appear here as the reason for the change, and there is no presumption in favor of the corporation. It must appear affirmatively that it acted within the scope of its powers. (Bank of Augusta *vs.* Earle, 13 Peters, 587. 2 Kent, 360, 361.)

(c.) But, finally and conclusively, it appears that the company was by these statutes forbidden to "CHANGE THE GENERAL ROUTE OR TERMINUS OF THEIR ROAD OR ANY PART THEREOF."

I need not argue, that in running the branch from Luray *via* Centerville to Nebraska City, the company did change some part of the general route, and did change the terminus. The company well knew that these things could not be done without authority from the Legislature, and hence they procured such authority. (Act of Feb'y 19, 1866, already quoted, Laws of 1866, p. 222.) The route of the Alexandria and Bloomfield Railroad was, under its original charter, "duly and permanently located and established" from Alexandria *via* Luray to a point on the State line near Upton, and "thereupon said company duly selected, located and established said point near said town of Upton *as its western terminus*, and proceeded to construct its road on said route along the entire length thereof, and procured the right of way therefor." So the answer avers, and so the demurrer admits. (See 6th plea, Record, p. 11.) No wonder, then, that it was thought necessary to obtain an act of the General Assembly to authorize the entire abandonment of the original route beyond Luray, and the entire change of the established terminus. As the road is now located under the act of 1866, there remains but about fifteen miles of it on the original line.

I submit, therefore, with perfect confidence, that at the time the constitution of 1865 was adopted, the original company did not have power to run its road into Schuyler county, and, therefore, by no possibility could have exercised the right to receive subscriptions to its stock from that county. And this being so, the judgment of the court below must be reversed.

If it be claimed that to apply these general statutes to companies chartered by special acts would be to destroy

vested rights, I reply that this question does not arise. If it were necessary to consider the nature and extent of the power of the legislature over railroad charters, we should be led into an important and somewhat complicated discussion. But I suppose it will not be denied that an amendment to a charter made before it has been accepted by the company, and before the company has organized, is perfectly legitimate and binding, especially where this right of amendment is reserved.

By reference to the act of 1853, (page 143, sec. 55,) and to that of 1866, (page 343, sec. 47,) it will be seen that under both of these acts the right of the Legislature to alter or amend is reserved, "provided such alteration shall not impair the rights of companies *previously organized*."

And by section 56 of the former act, "all existing corporations within this State, and such as now or hereafter may be chartered," were expressly made subject to the liabilities and provisions of the section (23) on the subject of changing routes; while the act of 1866, (sec. 48,) already cited, applied all its provisions to "*all* existing railroad corporations within this State and such as may hereafter be chartered or formed." The first of these laws, which covers the entire ground, and of which the second was simply a re-enactment, was in force before the Alexandria and Bloomfield Company had accepted its charter, or organized for business, and was therefore clearly binding upon that company, as will be seen by reference to the answer demurred to, which avers "that in the year 1857 there was an act passed as mentioned in plaintiff's petition to incorporate the Alexandria and Bloomfield Railroad Company, and that afterwards, *on the — day of September*, 1864, the corporators therein mentioned, accepted said act of incorporation, and organized," &c. (Record, p. 3, 2d Plea.)

To show still more conclusively that the Alexandria and Bloomfield corporation was to be subject to the provisions of the general statute upon which I rely, I call attention to

section 12 of the charter of that company, (Laws Mo., 1856–7, p. 96,) which provides: "The stockholders of said company shall be, and are hereby, exempted from the effects of sections 9 and 10 of the act entitled 'An act to authorize the formation of railroad associations, and to regulate the same,'" approved December 13, 1855." Why exempted from these two sections? Evidently because the legislature understood that except in so far as exempted the company and the stockholders would be bound by *all* the provisions of that act. By excluding the two sections named, the legislature included all the others. Upon any other theory the introduction of the exception or exemption was meaningless.

II.

The act of March 23, 1861, already quoted, provides:

"*It shall not be lawful* for the county court of *any county* to subscribe to the capital stock of *any railroad company* unless the same has been voted for by a majority of the resident voters who shall vote at such election under the provisions of this act."

Did this statute repeal or modify the section in the Alexandria and Bloomfield charter authorizing subscriptions to its stock by counties on its line without a vote of the people?

I have already discussed this question somewhat, but I wish to add the following suggestions:

1. This act, as will be seen by reference to it, was an amendment of the general act of 1866, regulating the formation of railroad companies, and defining their rights, powers, and duties. Now I have already shown that this act—the act amended—applied to companies organized under special charters. Clearly the amendatory act ought to have as broad an application as the act amended.

2. The language of the act of 1866 compels us to regard it as modifying all previously enacted charters which au-

thorized a subscription without a vote. It is prohibitory in form. "It shall not be lawful," is the opening phrase. How can this stand, and have effect, if it does not repeal or modify the clause in the charter which declares that the same thing "shall be lawful?" Says the charter: "It shall be lawful for the county court of any county in which any part of the route of said road may be to subscribe," &c. Says the act of 1861: "It shall not be lawful for the county court of any county to subscribe to the capital stock of any railroad company," without a vote of the people. These two statutes apply to the same subject-matter. They cannot stand together, and therefore the earlier must yield to the later.

3. It is manifest that the act of 1861 was intended to and did apply to companies chartered by special acts, from another consideration. If not so applied, it would have been practically nugatory. What was the evil aimed at by that act? Clearly, it was the danger apprehended by the Legislature that, if not prohibited, the counties of that State might burden the people, without their consent, with heavy taxes, to pay railroad subscriptions. Now it is said, upon good authority, that every railroad company existing in Missouri, at the time the act of 1861 was passed, was created by special act. (See note to case of State *ex rel. ex.* Garroute Central, Law Journal, July 12, 1878, page 36.) We need not, however, rely upon this statement. An examination of the statutes of Missouri, passed during the ten years preceding the passage of the act of 1861, shows the enactment of *fifty-two special railroad charters* within that period, and probably every one of them contained a clause authorizing counties to take stock without a vote of the people. It was for the very purpose of modifying these charters that the act of 1861 was passed. To have passed it, excepting special charters from its operation, would have been to defeat the evident purpose which the Legisla-

ture had in view. It would have been to pass an act permitting all the railroad companies then in existence (and they were very numerous) to receive county subscriptions without a popular vote of the people, and prohibiting no corporations then in being from doing so. These considerations led the Legislature to use language so sweeping that no ingenuity of construction can take away the remedy they provided for the taxpayers.

4. But furthermore, the act of 1861 was wholly unnecessary, unless applied to special charters. The general law had been previously amended so as to require a vote of the people to authorize subscriptions. (See acts of 1860, section 1, page 88.) The object of the legislature (to prevent county subscriptions without a vote of the people) had been fully secured so far as companies organized under the general law were concerned. The *only* purpose, therefore, of the act of 1861, must have been to control and limit the counties in the matter of subscribing to companies organized under special charters.

5. No question of vested rights under the old charter can arise, for the reason already stated, to wit: that the act of 1861 was passed long before the Alexandria and Bloomfield Railroad Company was organized or accepted its charter.

The company took the charter (in September, 1864,) well aware of the modification which had been made by the law of the State. As this answer is conclusive, no other is necessary. If another was required, it would be found in the simple suggestion that the company never could have had a vested right in the *manner* of making a county subscription, and the act of 1861 only changed the manner of proceeding, which the legislature was entirely competent to do. The right to subscribe was not taken away, but the manner of its exercise was regulated, and this the legislature was entirely competent to do.

These reasons all unite to sustain and support the recent decision of the supreme court of Missouri, already cited and commented on, itself an authoritative exposition of the State statute.

Respectfully submitted,

GEO. W. MCCRARY,
For Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

THE COUNTY OF SCHUYLER,
Plaintiff in Error,
vs.
JOSEPH T. THOMAS,
Deft. in Error.
No. 62.

ASSIGNMENT OF ERRORS.

The Court below erred—

1. In sustaining the demurrer of the plaintiff to the second, third, and sixth pleas of defendant's answer.

2. In rendering judgment for the plaintiff.

3. In holding that, upon the facts stated in said second, third, and sixth pleas in the answer, there was power in the County Court of Schuyler County to make a subscription to the capital stock of the Missouri, Iowa & Nebraska Railroad Company, and to issue to it the bonds and coupons in suit without a vote of the people.

4. In holding that said bonds and coupons are valid in the hands of the plaintiff.

5. In holding that, upon the facts set forth in the pleas aforesaid, any part of the line or route of the railroad was in Schuyler County by authority of the act of 1857, by which the Alexandria & Bloomfield Railroad Company was chartered.

6. In holding that neither of said pleas demurred to was a sufficient answer in law to plaintiff's action, and that all said pleas combined did not constitute such answer.

7. In holding that, no vote of the people was necessary, under the constitution and laws of Missouri, to authorize the subscription in controversy.

GEO. W. McCRARY,
For Plaintiff in Error.

In the Supreme Court of the United States,

No. [redacted]. 62

THE COUNTY OF SCHUYLER, IN THE STATE OF MISSOURI,
PLAINTIFF IN ERROR,

vs.

JOSEPH T. THOMAS,
DEFENDANT IN ERROR.

STATEMENT.

This is a suit on certain of the first maturing coupons of a series of bonds issued by the county court of Schuyler county, in the State of Missouri, in payment of one hundred and fifty thousand dollars of stock, subscribed by said county, to the capital stock of the Missouri, Iowa & Nebraska Railway company. The subscription was made by the court *mero motu*, by an order of said court, entered of record, prior to the 1st day of September, A. D. 1871, and on the 1st day of September, 1871, said bonds were issued by said county court in payment of said subscription.

The Missouri, Iowa & Nebraska Railway company was organized by the consolodation of the Alexandria & Nebraska City Railroad in the State of Missouri, with the Iowa Southern Railway company, in the State of Iowa, said articles of consolidation bearing date March 26th, 1870.

The constituent corporation, the Alexandria & Nebraska City railroad, was chartered by the Missouri legislature, by an act approved February 9th, 1857, the original name being the Alexandria & Bloomfield railroad company. The name was afterward changed to that of the Alexandria & Nebraska City R. R. by authority of an act of the legislature, approved February 19th, 1866. The charter of the company as originally granted by the legislature, conferred on this company, in Missouri, all the rights, privileges and immunities of the North Missouri railroad company, as contained in its charter approved March 3d, 1851.

The 24th section of the said charter of the North Missouri Railroad company provides that, "It shall be lawful for the county court of any county in which any part of the route of said railroad may be, to subscribe to the stock of said company, * * * and issue the bonds of such county to raise funds to pay the stock thus subscribed," &c.

The 8th section of the charter of the Alexandria & Bloomfield Railroad company is as follows:

"§ 8. Said company shall have full power to survey, locate and construct a railroad from the city of Alexandria, in the county of Clark, in the direction of Bloomfield, in the State of Iowa, *to such point on the northern boundry line of the State of Missouri as shall be agreed upon by said company and a company authorized on the part of the State of Iowa, to construct a railroad to intersect the road authorized to be constructed by the provisions of this act, at the most* PRACTICABLE POINT ON SAID STATE LINE, * * * AND MAY SELECT SUCH ROUTE AS MAY BE DEEMED MOST ADVANTAGEOUS."

The question for the court is, whether, under the provisions of this charter, the county court of Schuyler county had the authority to subscribe said stock *mero motu*, and to issue its bonds in payment of the same.

To the plaintiff's petition the defendant made answer:

1st. By a general denial of all the material allegations in the petition:

The second plea, in substance, is, that prior to the consolidation of the A. & N. C. R. R. with the Iowa Southern R'y Co., the former had permanently located a line of road from Alexandria, in Clark county, to a point on the Iowa and Missouri state line, near Upton, in Scotland county. That in the articles of consolidation, this location was recognized as the established route of the consolidated railway, and that no part of the line as so located was within Schuyler county. That the county court made the subscription of its "own mere notion," and without the assent of two-thirds of the qualified voters of the county, and charges notice of these facts on the defendant.

The third plea is the same as the second, except that the third plea charges that the line of the road, as the same is located and constructed through Schuyler county, was so located and constructed as an extension of the Alexandria & Bloomfield Railroad, as authorized by the amendatory act of the 19th of Feb. 1866, and that no part of the

road so located, is within Davis county, in the state of Iowa, and charges notice.

The 4th plea sets up an agreement between the railroad and the county, to the effect, that the railroad was to execute a certain bond of indemnity to the county before the bonds were to be delivered. That said bond was never so executed and delivered, and charges notice.

The 6th plea is the same as the third, except that it does not charge notice to plaintiff.

To the 2d, 3d, 4th and 6th pleas of said answer, the plaintiff interposed a demurrer.

In considering said demurrer, the parties agreed that the various acts of the legislature of Missouri, referred to in petition and answer, should be considered as public acts, and that a certain map (which is now before the court), showing the location of Clark, Scotland and Schuyler counties, and the towns of Alexandria, Luray, Upton, Bloomfield Memphis, Lancaster and Centerville, should also be considered as a part of the pleadings in determining said demurrer.

The court sustained the demurrer to the 2d, 3d and 6th pleas, and the defendant not electing to make any further answer or defense, final judgment was entered.

In the decision of the demurrer, the court were divided in opinion upon the following questions:

1st. Whether, upon the facts stated in the said 2d, 3d, and 6th pleas, as heretofore recited, there was any power in the county court of Schuyler county to make a subscription to the stock of the Missouri, Iowa and Nebraska Railway Company, and to issue to it the bonds and coupons in suit, without a vote of the qualified voters of the county, as required by article II, section 14th, of the constitution of the State of Missouri, which went into effect July 4th, 1865, and is yet in force.

2d. Whether, under the constitution and laws of Missouri, the bonds, the coupons whereof in suit are valid and enforceable in the hands of a bona-fide holder for value, having been issued without any election or vote of the people of the county, as stated in the sixth plea.

3rd. Whether the recital in the bonds, the coupons of which are in suit, that they were issued as authorized by act of February 9th, 1857, is binding upon the county in fa-

vor of a bona-fide holder thereof for value, and without notice, if in fact they were not issued under that act as amended February 19th, 1866, and after the second section thereof had been adopted by the company, and its road extended through Schuyler county to Centerville, without *without* a previous vote by the people, as stated in the said pleas.

4th. Whether the recital in the bonds, the coupons of which are in suit, that they were issued as authorized by act of February 9, 1857, is binding upon the county in favor of a purchaser who takes said bonds with notice of the facts as hereinafter stated, to-wit, that in fact they were not issued under that act, but were issued without a previous vote by the people, under that act as amended by the act of February 19th, 1866, and after the second section thereof had been adopted by the company, and the route of its road extended by virtue thereof through Schuyler County to Centerville, as stated in said pleas.

5th. Whether, upon the facts stated in said 2d, 3d, and 6th pleas, any part of the line or route of the railroad was in Schuyler County by authority of said act of 1857, or solely by authority of the said act of 1866; that is, whether, if the line could under said act of 1857 be located in Schuyler County, but was not actually located there under said act, but under said act of 1866, the authority to subscribe existed in the county without a vote of the people.

6th. The court differed in opinion whether the second plea was an answer in law to the plaintiff's action.

7th. The court differed in opinion whether the third plea was a sufficient answer in law to the plaintiff's action.

8th. The court differed in opinion whether the sixth plea was a sufficient answer in law to the plaintiff's action.

Whereupon, upon the motion of the defendant's counsel, it is ordered that the foregoing state of the pleadings and statement of facts, made under the direction of the judges, together with a certified copy of said acts and the said map, be certified to the Supreme Court of the United States for its action and decision thereon.

Given under our hands this 9th day of October, 1874

JOHN F. DILLON.
SAMUEL TREAT.

ARGUMENT.

I.

The change of route did not effect the privilege of the company to take municipal subscriptions upon the terms contained in the charter of the A. & B. R. R. Co.

The charter of the A. & B. R. R. Co. carried to it all the powers and privileges of the North Missouri R. R., as contained in its charter.

The right of the last mentioned R. R. Co., to change its route after location, is distinctly recognized and affirmed by the decision of the supreme court of the State of Missouri, in the case of *Lockland vs the North Mo. R. R. Co.*, 25 Mo., 515. In that case, the doctrine of the right of a railroad company to change its route after having once located the same, is fully discussed in the light of all the authorities, both British and American, and the court, after a full summary of the authorities, concludes the subject in the following language—(see pp. 530-1):

"It is not easy to determine from the act which incorporates this North Missouri R. R. Co., at what period the route can be said to be so located, as to deprive the company the power to change. The act gives the company an indefinite power to 'survey, mark, locate and construct,' a railroad from St. Charles to Iowa. The act is entirely silent as to how many routes may be surveyed—what shall be considered as binding the company to any particular route—how long it shall be so bound—and how often they may change their selection. It would seem that the power to change a location once determined on, is by no means expressly denied; but on the contrary is rather impliedly given. If the company begin at St. Charles and end on the Iowa line, there is no intermediate point determined, except, that they are restricted in their selection of a route, to that district of country which is denominated 'the divide' between the waters of the Missouri and Mississippi rivers; and what acts shall constitute a location are not specified. By reference to the 23d section of the act of 1853 (*see acts*

p. 133) it will be seen that the power to change the route is expressly given to the company. The only restriction upon this right contained in that provision, is, that where the alteration is proposed in a city or town, it can not be done *after the construction of one road unless with the consent* of the *corporate authorities;* and in all cases where *alteration is made after* GRADING HAS BEEN DONE ON THE ROUTE FIRST SELECTED, compensation must be made for the injury done to the lands graded. The 56th section of this act declares, that all existing railroad corporations in this state, and such as now or hereafter may be chartered, shall have all the powers and privileges given by the act; there is nothing in the 23d section of the act of 1853 at all inconsistent with any provision of the charter of the North Missouri Railroad company."

This we consider is conclusive on the rights of the Alexandria and Bloomfield Railroad Co. to make such changes as it might desire at any time, "so long as the line of its road was kept within the limits of the charter's route."

The court will remember that the charters of the two companies are identical, the latter having adopted the charter of the former.

II.

Schuyler county, is, under a proper construction of the act incorporating the Alexandria & Bloomfield R. R. Co., within the route as indicated by said charter. The railroad authorized by the charter was, "from the City of Alexandria, in the county of Clark, in the direction of Bloomfield, in the state of Iowa, to *such point on the northern* boundary line of the state of Missouri *as shall be agreed upon by said company and a company* authorized on the part of the *State of Iowa*, to construct a railroad to intersect the road authorized to be constructed by the provisions of this act *at the most practicable point on the State line, * * * and may select such route as may be deemed most advantagous.* As remarked by Mr. Justice Bradley in Scott County vs Thomas, 94th U. S. Rep., at p.

691: The road is only required to run in the direction of Bloomfield. It was not required to run to the town of Bloomfield. The only points named in the charter, are "Alexandria" and the "State line." The point on the State line is not mentioned further than it is to be "Such point as shall be agreed upon" by the A. & B R. R. Co and a company to be chartered in Iowa, for the purpose of connecting with it, so as to form a continuous line whereby the counties of southern and western Iowa may be brought into connection with the city of Alexandria in such way as to afford to said city a market communication with said counties; and in determining this point of connection, and the route whereby the same may be reached, the fullest powers are given to the two companies; TO SELECT SUCH ROUTE AS MAY BE DEEMED MOST ADVANTAGEOUS." Here is a condition in the location that is binding on the A. & B. R. R. Co., viz, that the place of crossing the Iowa state line shall be at such point, as may be agreed upon by said company and the one to be organized in Iowa. The A. & B. Co, could not in their own discretion determine that point, they were subject to the will of the Iowa company. The act required a concurrence of views upon this subject between the two companies.

In determining the question, the court will not loose sight of the object sought to be attained by the legislature of Missouri. These certainly were two-fold:

1st. to bring the city of Alexandria "into connection with the rich region of southern and western Iowa," and, 2nd to develop and give facilities for market to the country of northeastern Missouri, through which said railroad might run.

The enterprise, so far as the legislature of Missouri was concerned, was for the benefit of Missouri, and it will hardly be presumed that the legislature was particularly desirous to have the route of said railroad leave the state at the nearest point which could be reached.

The direction is that of Bloomfield. Bloomfield is in a northeasterly direction from Alexandria, and the road as constructed is in that direction.

Mr. Justice Napton, in delivering the opinion of the court in the case of Lackland vs North Mo. R. R. Co., speaking of the location of the route of railroads generally, and then applying it to the North Mo. R. R., says: "No line of the route is determined by the charter, for though a starting point is usually designated, and sometimes a terminus is also fixed, the line between these points, perhaps hundreds of miles apart, is left to be determined by the *interest, convenience* or *fancy* of the company. The counties through which the road is to pass are not determined, much less the particular tracts of land. The charter of the North Missouri Railroad authorizes the company to build a road from St. Charles, passing up the divide between the tributaries of the Mississippi and Missouri rivers, as near as may be, to the northern boundary line of this state.' Here is a scope varying probably from *ten* to *two hundred miles* within which the company are at liberty to locate their road. Railroads are constructed, here not so much with a view to furnish facilities to existing wealth and population and commerce, as to create it in a wilderness."

The charter of this last mentioned railroad company, further provides in the section defining the route, that it is to be constructed to the northern boundary line of the State of Missouri with a view to being extended to Des Moines in the State of Iowa. So here is a direction as much,--yes, more directly, than is provided in the charter of the A. & B. R. R. Co. Des Moines is not only a direction, but so far as it lay in the power of the legislature of Missouri to do so, it is made a terminal point; and yet the learned judge delivering the opinion in the above case says that under this charter the route of the road may vary from ten to two hundred miles. In view of this decision, and of the evident intent of the legislature in granting the charter of the A. & B. R. R., and of the provision that the terminal point shall be such as is agreed upon by the two companies, with power to select such route as may be deemed most advantageous, this court may well say, as it did say in Scotland county vs Thomas, *supra*, that the

route of this road does not lie through "Bloomfield, it is true; but it does not pass it by so far as to be a substantial departure from the route originally indicated."

III.

But we claim further, that in the determination of this case the court is not bound to take into consideration the route of the road as it is constructed through its entire length. The only question is, is Schuyler county so situated with reference to the route of the A. & B. R. R. as the same is defined in the charter, as that under said charter any part of the line of said railroad could lie in the county of Schuyler? If it could, then we maintain that Schuyler county was one of the counties authorized to subscribe under the provisions of the charter, and it is immaterial under said construction as to how much of the route of said road could under said charter lie within the said county. The language of the charter is: "Through which *any part* of the route of said railroad may be." Now by referring to the map, it will be seen that the town of Bloomfield is three miles west of the northeast corner of Schuyler county. It will hardly be claimed, and surely not seriously contended, that the town of Memphis, the county seat of Scotland county, is off the route, as the same is designated in the charter. It is the county seat of Scotland county, the only town of any importance in the county, and has a population of from two to three thousand inhabitants, and is surely such a point as would be 'advantageous" for the company to make in the establishment of its route. It is about 15 miles east and 24 miles south of Bloomfield. It is on the main branch of the North Fabius creek, which flows past the town from a northwesterly direction, having its source in the lower part of Davis county, Iowa, and even if the A. & B. R. R. was required to run so as to make Bloomfield a point,—which is the most that the defendant (plaintiff in error here,) can claim—then there is a most excellent route for said road following the broad bottom lands which lie on the west

side of said Fabius, along the line as indicated by the pencil dots upon the map which we herewith furnish the court. From this it will be seen that even making Bloomfield a point on said road, a part of it could well lie in Schuyler county, so that under any possible construction of said charter that the court may see fit to adopt, a part of the route of said railroad, as it was originally designated in the charter, could lie in said county. Such being the fact, we think it clearly follows that the county of Schuyler had the power to subscribe, if in fact the road should be located within its borders.

IV.

This brings us to the consideration of the fourth and fifth questions submitted by the circuit court, upon their certificate of division, viz:

"Whether the recital in the bonds, the coupons of which are in suit, that they were issued as authorized by act of February 9, 1857, is binding upon the county in favor of a purchaser who takes said bonds with notice of the facts as hereinafter stated, to-wit, that in fact they were not issued under that act, but were issued without a previous vote by the people, under that act as amended by the act of February 19th, 1866, and after the second section thereof had been adopted by the company, and the route of its road extended by virtue thereof through Schuyler County to Centerville, as stated in said pleas."

"Whether upon the facts stated in the 2nd, 3rd, and 6th pleas, any part of the line or route of the railroad was in Schuyler county, by authority of said act of 1857, or soley by authority of the said act of 1866; that is, whether, if the road could under said act of 1857 be located in Schuyler county, but was not actually located there under said act, but under said act as amended by act of 1866, the authority to subscribe existed in the county without a vote of the people."

At the time the circuit court divided in opinion upon these questions, this court had not decided the case of Callaway

Co. vs Foster, 93 U. S. Rep. 567, otherwise, we presume there would have been no division in the court upon this question. The principle of the two cases are identical. In the Callaway case the L. & M. R. R. was chartered to run from Louisiana in Pike county, through Bowling Green to a point on the Missouri River. Several surveys were made, passing through Callaway county and some through Boone and Howard to Glasgow on the Missouri, and not touching Callaway county at all. The line finally established as the main line of the road was through Boone and Howard. There was then an amendment to the charter enacted in March, 1868, whereby the line was extended so that the terminus might be on either the north or south side of the Missouri River, whereas in the original charter it terminated on the north side, and also providing for a branch road to run through Callaway county to a point on the Missouri River opposite to Jefferson City.

A prior subscription had been made by Callaway county to the company, which under its terms would have been to the main line; but the amendatory act required all subscriptions to the *branch*, authorized by the act of 1868 to be so designated, and to be kept in a separate book from subscriptions to the main line. It therefore became necessary to transfer the subscription; and this the court did without a vote. It was in effect the making of a new subscription to the *branch* road. No bonds had been issued under the former subscription, and it was in effect annulled and a new subscription made, and under this new subscription the bonds were issued reciting upon their face that, "This bond is issued by Callaway county, by authority of the act of the State of Missouri, approved March 10th, 1859, *as amended by an act approved March 24th, 1868.*"

In this case, then, the line of the road could under the act of 1859 have been located in Callaway county. But it was not located there under said act, but under the amendment of 1868, providing for a branch road through that county, and it was denominated a branch, and the bonds recite the fact of their being issued to it as such; and in

reference to this Mr. Justice Hunt in delivering the opinion of the court says:

"We are of opinion, also, that the amendments of the charter and the *subsequent action by which the portion of the road from Mexico through Callaway county, under such amendments was made a branch road*, and the portion from Mexico to Glasgow, was called the main road; and that the bonds were issued both under the act of 1868 and the act of 1859, if such were the facts do not effect the case. The latter act is an amendment, and continuation of the former, and refers to what was then termed a branch road."

Under the original charter of the Louisiana and Missouri R. R., the county of Pike was a necessary county through which the road, if built, must run. After that, the counties of Montgomery, Audrain, Callaway, Boone and Howard were possible sites, through which the road might run. Whether it ran through the latter counties, and through which, was a matter to be determined according to the "interest, convenience or fancy of the company." Such being the fact, either of said counties were authorized by the charter to subscribe; and it was immaterial whether the road as ultimately located, was so located, by virtue of the original charter; or by virtue of the amendment of 1868, in as much as that under the original charter it might have been located in either county; and as remarked by Mr. Justice Hunt in the above case: "The case of State vs Saline Co., 51 Mo., 350, does not conflict with this principle;" for in the last case, Saline county being upon the south side of the Missouri river, and the terminus of the road under its original charter being upon the north side of the river, no part of it could possibly have been in Saline county under said original charter; so that Saline was not one of the counties, which, under said charter, are authorized to subscribe. Therefore, the amendatory act could not confer such power after the adoption of the constitution of 1865. Instead of there being any conflict, there is a perfect harmony in these cases. Applying these facts to the case at bar, we find that by the original charter of the A. &

B. R. R. the route of the road was from necessity through Clark county. That under said charter the route might also lie through the counties of Scotland and Schuyler. The counties, therefore, of Clark, Scotland and Schuyler were under said charter authorized to subscribe. In 1866 the company having in view the building of a *branch* (if you may be pleased to so call it), or an extension of its line, as it is termed by the act, through the entire north tier of counties in Missouri, via of Rockport to Nebraska City and also a line to connect with a road in Iowa as indicated by the original charter; procured an amendment to their charter, authorizing such extension, and a change of name. Thereafter, the road was actually located and built through Schuyler county, and the subscription was made and the bonds issued. We claim that it is immaterial whether such location was made under the provisions of the original charter, or under the same as amended by the act of 1866. In either case, we claim that in as much as Schuyler county "was one of the possible sites of said railroad and a site ultimately occupied," that therefore the subscription was valid, for "the amended charter attaches to itself all the qualities and priviledges of the old one." Callaway Co. vs Foster, *supra*.

It may be urged that the line of the road as it was finally located and built, is not within the route as originally chartered; that under the charter it could only pass over the northeast corner of the county. While not for a moment conceeding this to be true, we nevertheless answer it by saying, that in as much as under the charter Schuyler county "was one of the possible sites, and a site ultimately occupied in fact, that therefore the power existed before the change in the constitution, and the legislature having by the constitution the right reserved to alter or amend the said charter (Art. XI, Sec. 3, Const. of Mo., 1865; State *ex rel* vs Cope: Giv. & State Line R. R., 48 Mo., 468), the power was not affected by such amendment. That is to say, that in as much as Schuyler county was within the route as originally chartered, and therefore authorized to subscribe under the provisions of such charter, it does not

follow as a proposition of law, that a subsequent amendment of the charter changing the route within the county, deprived the county of the power conferred by the charter. We do not claim that Schuyler county acquired or could acquire the right, from the act of 1866, to subscribe other than as designated by the constitution; and on the other hand we contend, that, if it had any such right under this original charter, the amendatory act did not take away or impair such right. The county could neither acquire nor lose the right to make the subscription by reason of the amendment. The people certainly have no ground of complaint, if instead of two or three miles of road in the county they have twenty.

A. J. BAKER,
for Defendant in Error.

Supplemental Brief

OF DEFENDANT IN ERROR, IN ANSWER TO ARGUMENT OF PLAINTIFF IN ERR. R.

I.

The court will observe that we do not claim any right to a subscription, except under the authority conferred by the provisions of the act of February 9th, 1857; and if under the provisions of that act, and of the route as therein designated, the said route could not by any fair and judicial interpretation, lie through any part of Schuyler county, then, we do not claim that the county court of said county had any right to subscribe without a precedent vote. But if upon a fair construction of said charter as contained in said act of February 9th, 1857, the route of said road might lie through any part of said county, then it was one of the counties which under the provisions of said act were authorized to subscribe upon the terms of the 10th section of the charter of the North Mo. R. R. Co.; and we claim that it is then immaterial, whether such location was made wholly under said act of Feb. 9th, 1857; or, under said act as amended by the act of Feb. 19th, 1866. That according to the decision of this court in the case of Callaway Co. vs Foster, 3 Otto, 567, the amended charter "attached to itself all the qualities and privileges of the old one."

The time when the location was made cannot be material, whether made prior or subsequent to the subscription. The language of the charter is the same as that used in the charter of the Louisiana and Missouri R. R. R., to-wit: "It shall be lawful for the county court of any county in which any part of the route of said railroad may be to subscribe," &c.; and in the Callaway case, this court held that in view of the fact, that the charter refers to a location yet to be

made, by a company yet to be organized, it could only refer to what under the charter was one of the "possible sites," and that it is enough to make the subscription valid that the route is the one ultimately selected and used. It is purposely left so in order that the company may have the benefits of competition between different localities. The history of all the railroads built in the west, in the last quarter of a century, shows that competition in the way of aid is sought by railroad companies, and the route is chosen ultimately largely in view of the aid obtained.

II.

What has gone before disposes of all the material parts of the argument of the Plaintiff in Error. In connection, however, with his claim, that under the charter no part of the route could be through Schuyler county, he makes other claims, which I will briefly notice.

1st. That "The counts in the answer demurred to and which are to be taken as true, distinctly aver that "no part of said route was within Schuyler county. The averment which the learned counsel quotes, is from the 2d plea of the answer, and has no reference to the route as finally located, or to the averment of the petition that a part of the route of the road as the same is defined in the charter, was within Schuyler county." The averment of the petition is denied in the 1st plea of the answer, and not at any time referred to again in the answer. There was no demurrer to the 1st plea.

The averment above, quoted from the 2d plea, is, that the route as once located by the way of Upton, was not in Schuyler county. Upon this point there is no dispute. There was a location and partial construction on the route *via* Upton, as is shown and agreed to in the map filed.

The third plea then states, that afterward there was another route located upon the line as provided in the act of 1866, *via* Schuyler county. So that the fact of a location and construction of the road through Schuyler county is fully shown by the pleadings.

The map is then made a part of the pleadings, in order that the court may determine whether or not Schuyler county is within the route, as designated in the act of 1857.

2d. In the III subdivision of his argument, the learned counsel says: "It was not possible to locate the route of the original company so as that any part of it would have been in Schuyler county, without violating the charter."

In answer to this we simply call the attention of the court to the maps herewith submitted, and by examining the line drawn from Luray to Upton and thence to Bloomfield; and then examining the route from Luray to Memphis, and from thence to Bloomfield; the court will see that there is no appreciable difference in the two angles, and the latter route would lie across the N. E. corner of Schuyler county, following the stream from Memphis into the southern part of Davis county, Iowa. We think that in view of this showing of the map, the assertion of the counsel is unwarranted, even if the court should hold that the road had to go to Bloomfield. But as before remarked, this the court in the Scotland case found, was not the legal interpretation of the charter. The court in that case say Bloomfield is only a direction, and not a point, and that the route as ultimately adopted is no substantial departure from that designated in the charter. Companies are allowed a latitude, and the exercise of a reasonable discretion in the establishment of their line of road, so as to subserve the best interests, both of the company, and the public. This latitude is allowed, and this discretion may be exercised, either in reference to the cost of construction, or, the adaptability of the route to the demands of trade and travel, both with the view to accommodation of the public, and the ultimate profit of the corporation. And the question of competition in aid may also be taken into consideration, as was remarked by the Supreme Court of Missouri, in the case of Lackland vs N. M. R. R. Co., 25 Mo., 515.

Looking on the map of our country, it is now too late to say that railroads are to be constructed on the most direct routes named in their charters. Such has not been the

practice of companies, nor the requirements of courts, especially in Missouri, whose laws the court is now called upon to expound. For as said by Mr. Justice Napton, in the Lackland case (*supra*), "No line of the route is determined by the charter, for though a starting point is usually designated, and sometimes a terminus is also fixed, the line between these points, perhaps hundreds of miles apart, is left to be determined by the *interest, convenience*, or fancy of the company."

This is also in harmony with the case cited by the gentlemen, viz: Railroad Co. vs Railroad Co., 3 Ind., 487. In that case the court will find that a detour from the direct route was made forty miles to the north, yet the court held that for the purpose of obtaining a feasible route such detour might well be made.

Now taking this case in connection with the Lackland case, *supra*, and applying them to the case at bar, with the light thrown upon it by the map, we think there can be no question as to the fact that Schuyler County is within the route as designated in the original charter. As stated in my first argument the town of Memphis, is the county seat of Scotland County, the largest town on the route of the road, and, certainly, a very desirable point to be made. If you once concede that the road under the original charter could be built to Memphis then Schuyler County is upon the route to Bloomfield.

3d. In the 4th sub-division of the argument of plaintiff in error, counsel say that the answer shows that the route by Upton was selected, agreed upon, &c., *and partly* constructed. This admission that the road was only partly constructed becomes important in view of the claim of the gentleman that a change could not thereafter be effected. The statute of Missouri directly recognizes the right to change the location, at least at any time before completion, and the court in the Lackland vs N. M. case says: "It is not easy to be determined from the act which incorporates the North Missouri R. R. Co., at what period the route can be so located as to deprive the company of the power to change. * * * The act is entirely silent as to how many

routes may be surveyed—what shall be considered as binding the company to any particular route—how long it shall be so bound—and how often they may change their selection. * * * * The only restriction upon this right * * is that where the alteration is proposed in a city or town, it can not be done *after the construction of one road* unless with the consent of the corporate authorities; and in all cases where *alteration is made after grading has been done on the route first selected*, compensation must be made for the injury done to the graded lands."

This authority is certainly sufficient to settle the question as to the right to change the route first selected, *via* Upton. The question is one of the construction of the laws of Missouri, and that construction has been authoritatively settled long before this court is called to pass upon it, and is of binding force upon the court.

Not only is it a construction of the laws of Missouri, but it is a construction of the very charter under which we claim our rights to change; made by the court before the change of route of the A. & B. R. R. was determined upon, consequently in making the change of route which they did they were acting under the law as settled in the Lackland case. It is hardly necessary for me here to remind the court that the charter of the North Mo. R. R. Co. was adopted and made applicable to the A. & B. R. R. Co.

If the doctrine contended for by plaintiff in error was true, there would be very few railroads, especially in the west, whose charters would not be subject to forfeiture. There is nothing more common than to locate a road upon one route and then change to another. There may be various causes for such change, and the mistakes and disadvantages of a first location may be corrected and overcome in a subsequent one. If a location once made is to be construed "according to the laws of the Medes and Persians which altereth not," what would be the effect if a company was to make a mistake in a location and from any cause find themselves unable to complete construction upon that route? According to the gentleman's theory, all privileges under the charter would be forfeited, and a mistake in this

respect could never be remedied. I cannot believe that any court ever meant to establish such an inflexible rule.

The cases quoted by the gentleman do not bear such a construction.

4th. In the 5th sub-divison of the gentleman's brief, he asks: "If this extension was authorized by the original charter, why was this amendment deemed necessary?" The answer which he then gives is not the correct one by any means. The amendment was not, to authorize the road to run through Schuyler county, but to authorize its extension through the entire northern tier of counties in the State of Missouri. Schuyler, as we show, and as this court has held in the Scotland case, is within the route of the original charter.

There is no reason therefore why a main line might not be built from Luray to Upton, and an extension through Schuyler County and not at all affect the right of the county court to subscribe under the provisions of the original charter, and the fact that one was called a main line and another an extension can make no possible difference. No new rights to subscribe are acquired by the act of 1866 and no old ones are lost. If the company had acquired the right to build its road through Schuyler County, or any part of it, by virtue of the act of 1857, it did not lose or forfeit such right by accepting the amendatory act of 1866, which authorized it to build its road through the counties west of Schuyler.

5th. The third question asked by the circuit court in the certificate of divisions: "Whether the recital in the bonds, the coupons of which are in suit, that they were issued as authorized by act of February 9th, 1857, is binding upon the county in favor of a *bona fide* holder thereof for value, and without notice, if in fact they were not issued under that act but were issued under that act as amended February 9th, 1866, and after the second section thereof had been adopted by the company, and its road extended through Schuyler County to Centerville without a previous vote by the people as stated in said pleas."

The council for plaintiff in error claims in the 9th sub-dis-

vision of his argument, that it is not necessary to allege or prove notice to the bond purchaser of the want of power in the county, &c. If there is any absolute want of power, this would be true. But where the power is shown to have existed as recited in the bonds, then a subsequent act of either the party issuing the bonds, or the company to which they are issued, will not render the bonds in valid in the hands of a purchaser for value without notice. Inasmuch, therefore, as Schuyler County was one of the counties through which the route of the said railroad could properly lie under and by virtue of the act of Feburary 9th, 1857, it had the power to subscribe by its court without a precedent vote, and the recital in the bonds that the subscription was made in pursuance to the power so conferred, is binding upon the county in favor of an innocent purchaser. The purchaser is only to inquire as to the authority under the law. He is not bound to inquire whether the recital that the bond was issued in compliance with such authority is true or false. So this defendant in error was not bound to inquire whether or not the M. I. & N. R'y Co. had located its route through Schuyler County, under the authority of the original act alone, or under that act as subsequently amended. The bond is offered him. The power to make it is recited upon its face. There he finds the law referred to--he reads the law—looks on the map and sees that by a reasonable construction Schuyler County is within the route as designated in the charter, in the act referred to as the authority. He is bound to inquire no farther.

The learned gentleman on the 5th page of his supplemental brief calls the attention of the court to what he conceives to be a difference between the Green county and Henry county case and the case at bar, viz: That in the two former cases the branching privileges were conferred prior to July 4, 1865, whereas in the present case the amendment authorizing an extension was not adopted until after that date. While this is so, it is not true that the decision in the cases mentioned turned upon that question. The fact is only incidentally referred to by the judge delivering the opinion. The true grounds of the decisions

were that the power existed prior to the adoption of the constitution and was not taken away by that instrument.

So, here, the power existed in the county court of Schuyler county prior to the adoption of the constitution of 1865, and was not affected by that instrument; neither was it affected by the act of 1866. Both the constitution and the act left the power as it was found.

In the Callaway vs Foster case, the amendment making in terms the route through Callaway county a branch, was passed in 1868, and this court holds that that fact does not impair the power that had previously existed. That the amended charter attached to itself the powers and privileges of the original one.

In his supplemental brief, page 3, counsel again refers to the fact that the matters stated in the preceeding paragraphs are admitted by the demurrer. The demurrer only admits what the answer states, that is, as stated in the second plea, that the route as located by Upton was not in Schuyler county, and, as stated in the 3d plea, that the route as located in Oct. 1871, *was* in Schuyler county Mo., and not in Davis county, Iowa. It nowhere admits that what is stated in the petition is untrue, namely that *the route of the road as defined in the charter lay through a part of Schuyler County.* It is nowhere averred in the answer that the *route as defined in the charter could not lie in any part of Schuyler county.*

The allegation of the petition respecting the route is denied in the 1st plea. But the demurrer to the 2d, 3d and 4th pleas being sustained, the plaintiff in error chose to defend no farther, but stood upon his answer as contained in the pleas demurred to and the plaintiff below took judgment.

It cannot, therefore, be properly said that it is admitted that Schuyler County is not within the route of the railroad as originally chartered.

That particular question, as the pleadings stand before this court, is neither admitted on the one side or denied on the other. The defendant in error in his argument claims that Schuyler County is within the chartered limits of the road. The plaintiff in error, in his argument, denies it, and

by the order of the circuit court and the consent of the parties, the map is submitted to this court, and from said map and the act of February 9th, 1857, this court is asked to decide whether the route of the road as defined in said act could under any circumstance, lie through any part of Schuyler County. We regard this as the material question in the case.

On page 6 of the counsel's supplemental brief, the court is asked to consider, the provisions of the act of March 23d, 1861. The learned gentleman says: "This section was for the first time discussed, and construed by the supreme court of Missouri, in the recent case of the State *ex rel* vs Garroutte, April term, 1878."

Had the geatleman been as diligent in his research as is usually his wont, he would not have been so misled by the declaration of the court cited. At the October term of the supreme court of Missouri, for the year 1873, in the case of State *ex rel* vs County of Clark, 54 Mo., 58, this act of 1861, together with a similar act of 1860, and statutory provisions of 1855, and of 1865, were all fully and thoroughly discussed. The learned judge (Napton,) in delivering the opinion of the court, devotes more than three full pages to the discussion of this act of 1861, commencing near the bottom of page 67 and continuing to the top of page 71; to which discussion we call the attention of the court.

The court will see that the learned judge refers to the fact, that the same question was presented to the Supreme court of Missouri, in the case of Macon Co., 41 Mo., 453, and that the court did not then deem the question of sufficient importance, to particularly notice the argument of council, that the said act was a prohibition upon the county court in all cases; the court simply dismissed the subject by referring to the decision in Alexander vs St. Louis, 23 Mo., 483, and the remark: "There is nothing irreconcilable, between a general prohibition to subscribe for stock in a corporation, and a permission to subscribe for stock in a particular corporation." See page 460, 41 Mo.

This Macon county case was the first of a series of similar cases, and nine-tenths of all the municipal subscriptions

to railroads in Missouri were made after this case was decided; and the bonds issued in payment of the same, were purchased on the faith of that decision. The effect of the said act of 1861, was, as we have shown, again pressed upon the attention of the Court in Smith vs Clark Co., *supra*. The subscribtion was there made under the same act as that of the present case,viz: under the power conferred by the A., & B. R. R. charter,so that the decision is directly in point in this case. The learned judge after citing from 23 Mo. 483, 37 Mo, 597, 38 Mo. 529, 47 Mo. 146, 47 Mo. 349, and 51 Mo. 522, concludes as follow: "So that the provisions of the Rev. Code, of 1855, and the amendatory act of 1860 and 1861, and the constitutional prohibition, and the legislative adoption of that prohibition immediately after its passage, *have been held by repeated adjudications, and* WITHOUT ANY CONFLICTING OPINIONS OF THE COURT OR OF ANY INDIVIDUAL JUDGE THEREOF, so far as the reports show, not to effect the repeal of the privileges contained in special charters." Then, after referring to the legislative construction, as shown in the act of January 30, 1872, and, to the fact that the said decisions had been the inducement to corporations and citizens to invest large sums of money in such securities, says: "After the acts of 1855, 1860, 1861, 1865, the subject was regarded as *res adjudicata*, and upon this view, millions of dollars have been invested. Whatever, therefore, might be the opinion of this court, or of any individual judge, had the question come up for examination as an open one, *we are all of the opinion that it is now too late* to disturb the received construction." This case was afterward cited and affirmed as to this point in State *ex rel* vs Greene Co., 54 Mo.

This court has repeatedly recognized and followed the doctrine of these cases, in all the cases which have been before it from the state of Missouri involving that question and as was well remarked by Judge Napton, "it is now *res adjudicata*." These decisions have become a rule of property and fall within the just, and equitable doctrine, of Gelpke vs. Dubuque, and, of Thompson vs. Lee County.

The Supreme court of Missouri has shown a strange dis-

position recently, to reverse its former adjudications in a number of instances, where such prior adjudications have been adopted and followed by this court, and while it is true that this court, will, as a rule, adopt, and follow the decision of the state courts in relation to statutory construction of state statutes, we believe this court has never yet adopted the rule that after a construction of a state statute has been adopted by the state court, and recognized by this court, that then, and as often, as the state court reverses its former decisions this court will follow in wake and change its rulings.

Respectfully submitted by

A. J. BAKER and
F. T. HUGHES,
Attorneys for Defendant in Error.

IN THE

Supreme Court of the United States.

No. 62.

THE COUNTY OF SCHUYLER, PLAINTIFF IN ERROR, vs. JOSEPH T. THOMAS, DEFENDANT IN ERROR.

I.

Since writing our brief, the counsel for the plaintiff in error has submitted a second supplement to his former brief, wherein he urges two points, which he evidently deems the pivotal points in his case. The first is:

I. That the statutes of Missouri in force at the time the constitution of 1865 was adopted expressly prohibited any change in the *general route* of the A. and B. Railroad, as then laid out, surveyed, and located.

In this the learned gentleman is mistaken. The only law in force in Missouri at the date at which the said constitution took effect was the law of 1853 (p. 133). It is found in the Revised Statutes of Missouri, vol. 1, p. 423, sec. 24, and reads as follows:

"The directors of any company under this act may, by a vote of two-thirds of their whole number, *at any time* alter or change *the route* or *any part of the route* of their road *if it shall appear to them that their line* can be improved thereby," &c.

This act was made applicable to the A. and B. Railroad, from the fact that it was passed before the charter of said corporation had been accepted and the company organized thereunder. The company was organized, as stated in the

defendant's answer (Rec., p. 3, 2nd plea), in September, A. D. 1864. Any change made in said law after that date which would in any manner impair the rights of the A. and B. Company was not binding on it. See sec. 56, p. 438, of same statute.

The act of 1866, to which the gentleman refers, was passed subsequent to the date of the organization of the A. and B. Railroad Company, and subsequent to the adoption of the constitution of 1865. It was first made a law by insertion in the General Statutes which were adopted in the spring of 1866. While we do not desire to open up the question of how far this company is subject to the future legislation of Missouri, from the fact that we do not deem it necessary, we will nevertheless say that it is clear that if the right to change a route at discretion, as the same is given in the act of 1853, is restricted and hampered by the subsequent act of 1866, it is then an impairment of the rights of the A. and B. Railroad Company, which was organized prior to the passage of said law. This principle has been fully recognized in the case of Scotland County *vs.* The M., I. and N. Railway Company, reported in the 65th Missouri Reports. We also refer the court, as we have before done in our first brief, to the case of the N. Mo. R. R. Co. *vs.* Lackland, 25 Mo., 515, where the subject of the right to change a location is fully discussed.

II.

We claim, however, that there has been no change of the *general route* of the road. A location may be materially changed and yet the *general route* of the road not be affected. It is not every change of location that is a change of route. What we understand by the route of a railroad, is the general couse or direction of the road, as authorized by its charter, and what that general course is must be gathered from the wording, and the intent and meaning of the charter. This whole subject has recently been before this court in the case of Scotland County *vs.* Thomas, 4th Otto, 682.

The effect of a change of route was then relied upon, and urged by the gentleman now urging it in this case. It was in respect to this very road, and the same charter and laws as applied thereto was then under consideration. It was then urged that, inasmuch as the road was changed from its first location so as to run through Memphis, in Scotland County, and Lancaster, in Schuyler County, Mo., and thence to Centerville, in Appanoose County, Iowa, instead of by way of Upton to Bloomfield, therefore it was a new and a different enterprize, &c. And the map of the country and route of the road was diagramed and agreed to for the instruction of the court, and after a full consideration of the subject the court say, by Mr. Justice Bradley delivering the opinion:

"Bloomfield was a small town in Iowa, evidently not intended as the final objective point of the proposed line, which *is only required to be in the* DIRECTION of Bloomfield. A connection with a continuous road in Iowa was the declared object of the road proposed. It was evidently the *purpose* to bring Alexandria, a port of Missouri, on the Mississippi, in connection with the rich region of southern and western Iowa, by means of the road then being chartered, *and a road to connect therewith, running into the State of Iowa.* THE GENERAL DIRECTION OF THE ROAD IS NOT CHANGED; it does not pass through Bloomfield, it is true, but it does not pass it by so far as to be a substantial departure from from the route indicated."

This, it seems to us, is sufficient to dispose of this entire question; but, inasmuch as it is so strongly urged upon the attention of the court, we will discuss it more at length.

As stated by the court, the object was to have a continuous line of road through the northeast part of Missouri, and the south and west part of Iowa. So it was provided that the road was to cross the line at such point as could be agreed upon between the two companies; that is to say, the A. & B. R. R. Co., and some company to be thereafter formed in Iowa, to connect therewith. The Alexandria and Bloom-

field Company could not, therefore, make any certain, permanent, and unalterable location until such company had been organized in Iowa and agreed to the point of intersection.

The plaintiff in error says in its answer (Record, p. 9) that this Iowa Company was formed in 1866, and that the point of intersection was agreed upon in 1868, therefore, the other averment upon which the counsel seems so much to rely, *i. e.* that the A. & B. Company had permanently located the line of its route to a point near Upton in 1865 must be a mistake. The location could not be considered permanent until the Iowa Company had agreed to it, which was in 1868. So that it cannot be said that the terminal point on the State line was fixed prior to the adoption of the constitution in 1865. The two companies then, after the adoption of the constitution in 1865, had the right to select any point on the State line as the point of intersection which would be authorized by the terms of the charter. Nor could the fact that they once did agree to intersect at or near Upton exhaust their powers so that no change could thereafter be made. We say that this concurrence and agreement of the parties must be understood as conditioned upon the abilities of the two corporations to carry their agreement into effect. The completion and putting into operation of the road depends, in a great measure, upon the local aid which can be obtained after a location has once been made. This local aid forms the basis of the construction of all the railroads in the West when Government subsidies have not been obtained; without it no road can be built. Such is the history of railroad building in the West; and courts have ever regarded this known fact as worthy of consideration in the determination of these cases. The supreme court of Missouri, in Smith *vs.* Clark Co., 54 Mo., 58, does not hesitate to recite the circumstances of this aid, being relied upon by companies in the construction of their roads, as a fact worthy to be taken into consideration in support of the conclusions arrived at. The case finds an apt illustration in

the case of N. M. Co. *vs.* Lackland, *supra*, wherein Justice Napton says, that in this country railroads have been, and are built not so much for the accommodation of existing wealth and commerce as to develop it in a wilderness. And the learned judge who delivered the opinion in the Scotland case says: "The project of the railroad promised a great public improvement conducive to the interests of Alexandria *and the counties through which* it would pass. *Its construction, however, would depend greatly upon the local* aid and encouragement it might receive. The interest of its projectors, and the country it was to traverse, were regarded as mutual. The power of the adjacent towns and counties to subscribe to its *stock as a means of securing its construction* was desired not only by the company, *but by the inhabitants.* * * * The power was sought at the hands of the legislature, and was given. It was *relied on by those who subscribed their private funds to the enterprise. It was involved in the general scheme as an integral part of it, and as much contributary and necessary to its success as the prospective right to take tolls.*"

In view of all these facts we can see no reason why the mistakes of a first location might not as well be remedied in this regard as in any other. It is a question of *feasibility.* The parties contract with reference to this prospective aid, and their ability to carry out such agreement depends upon it. This fact no one will gainsay. It might be, then, that the Alexandria and Bloomfield Railroad Company could have carried out its agreement to build to Upton, and that the Iowa Company afterwards found that it could not obtain the necessary local aid in Davis and Van Buren counties, in Iowa, to enable it to comply on its part. In that case, Schuyler county being in the route as originally chartered, proffers her aid upon condition that the road be built through the county via her county seat. Her interests make it desirable that the road be so located and constructed.

Now, *quere?*—Must the entire enterprise be abandoned because there has been a survey and a partial construction on

another line? Could the Legislature of Missouri have meant that such a narrow construction should be put upon their act? A construction whereby so slight a mistake must render worthless the grant of privileges given. Luray, the town in Missouri at which the point of divergence in the two lines occurs, is 24 miles in a northwesterly direction from Alexandria. Perhaps the A. and B. Company had constructed its road to that point before the Iowa Company discovered its inability to meet it. It had certainly gone very far toward completion, for it had begun work between Luray and Upton. Must the enterprise fail simply because a point not essential to be made, not named in the charter, had been once selected and agreed upon, and afterward found to not be feasible? We cannot believe that this court will give any such construction to the charter and laws of Missouri.

III.

The plaintiff in error is not in condition to call in question the right of the company to make the change nor the fact as to whether the change was effected in the mode prescribed by law. The unauthorized change cannot affect the power to subscribe. Schuyler County is within the chartered route, and does subscribe, and the road is built through it. The manner in which it came there cannot affect the validity of the subscription, and certainly not of the bonds in the hands of third parties. A change that would have the effect even to forfeit the charter cannot be set up as a defense to the payment of subscription.

> Conn. & Passumpsic R. R. Co. *vs.* Bailey, 24 Vt., 465; R. R. Co. *vs.* Casey, 26 N. Y., 75; Crump *vs.* Mining Co., 7 Gratt., 352; Bank *vs.* Renick, 15 Ohio, 322; R. R. *vs.* Renshaw, 18 Mo., 210; R. R. *vs.* Hughes, 28 Mo., 291.

Having subscribed upon condition that the route should be so changed as to come through the county, the plaintiff

in error thereby assented to the change, and cannot now, after the road has been built as asked for in the subscription, be heard to question the authority of the company to so change its line of way. This, we think, is also settled by this court in the Scotland case. The county court, in making the subscription, had full discretionary power; and, as Mr. Justice Bradley says, "acted as the representative authority of the county itself, officially invested with all the discretion necessary to be exercised under the change of circumstances."

V.

However the route may have been changed, it is now too late to call it in question in this case. There is no averment of a change of route in the answer or any of the pleadings. It is averred in the answer that there was an extension built through Schuyler County, and that the extension was made under the authority conferred in the act of 1866. There is no averment that the route by Upton was changed. The gentleman evidently seeks to avoid the force of this circumstance by insisting that the company knew it had no power to so change its route as to build through Schuyler County, and therefore procured the amendment of 1866. This is simply a fancy of the learned counsel. The act itself recites the purpose of the change. It is to build an extension through the entire north tier of counties in Missouri *via* Rockport, in Atchison County. Atchison is the extreme western county in Missouri. The fact that the road runs where it is admitted that it does run, *i. e.*, into Iowa instead of through Missouri, shows that it was not located there under authority the act of 1866, but under the act of 1857. At the time the amendment was enacted, there had been a survey to Upton, and there was in process of formation a company in Iowa, which afterward was formed, called the Iowa Southern Company; and it was then contemplated that a line would be built to Upton. The project, however, of building to Upton

has never been carried out, and we are indifferent whether the route, as built, was so built *wholly* under the authority conferred by the act of 1857 or by the authority of that act as amended by the act of 1866. We have fully shown that in either event, that, inasmuch as Schuyler County was one of the possible sites under the act of 1857 and a site ultimately chosen, the power to subscribe existed.

It is further claimed by the gentlemen, in argument, that the route of the road was not changed for the reason nor in the manner provided by law, and that inasmuch as we have not averred, and proved that the change was made for those purposes and in that manner, that, therefore, the court is bound to *presume* that it was made unlawfully, and in disregard of these statutory provisions.

We were not called upon to plead any change. We simply declare on our coupons, and if the plaintiff in error desired to raise that point he should have done so by his answer. The court will not presume that the change was made in an unlawful manner, but in the absence of any contrary showing *will* presume that the directors in making the change acted within the requirements of the statute. The authorities cited by the learned counsel does not support the position he assumes. Upon the contrary, however, we call the attention of the court to the language of Mr. Abbott, in his digest on corporations (page 572, subdivision 47, he says):

"The dealings of a corporation which, on their face, or according to their apparent import, are within its charter, are not to be regarded as illegal or *unauthorized*, *without* some evidence to show that they are of such a character. *In the absence of proof, there is no legal presumption that the law has been violated.* On the contrary, these artificial bodies, like natural persons, are entitled to the benefit of the rule which imputes innocence rather than wrong to the conduct of men."

And he cites numerous authorities wherein the question has been raised in every conceivable shape.

VI.

The second proposition in the counsel's last brief is that the act of 1861 repealed the authority conferred upon the county courts under the A. & B. charter.

We have already called the attention of the court to the contrary decisions in Missouri on that point, and in particular to the very exhaustive opinion of Judge Napton in the Clark Co. case, 54 Mo., 58.

All that the gentleman relies on is the dictum of Judge Sherwood in the Garroutte case. The court will see that no such thing was ever decided by the court in that case. Judge Sherwood undoubtedly would like to have had the court so decide; but Judges Henry and Norton refuse to concur in what he says upon that point, and express no opinion in reference to the effect of the act of 1861, while J. J. Hough and Napton dissent *in toto*. Perhaps the learned gentleman is relying on the review of Mr. Edwards, published in a note to the decision, wherein the construction of this honorable court is called in question.

We will further call the court's attention to the case of Smith *vs.* Clark Co., and ask its candid perusal, not only of Judge Napton's opinion, but also of the opinion of Judge Adams upon a motion for rehearing.

This act of 1861 was urged upon the court as not having been fully considered by the whole court at the first hearing. Judge Adams says that it was fully considered, and the conclusion announced was the conclusion of the whole court, and gives cogent reasons therefore.

See page 80, 54 Mo.

Respectfully submitted,

A. J. BAKER,
F. T. HUGHES,
For Defendant in Error.

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All that the gentleman relies on is the dictum of Judge Sherwood in the Garroutte case. The court will see that no such thing was ever decided by the court in that case. Judge Sherwood undoubtedly would like to have had the court so decide; but Judges Henry and Norton refuse to concur in what he says upon that point, and express no opinion in reference to the effect of the act of 1861, while J. J. Hough and Napton dissent *in toto*. Perhaps the learned gentleman is relying on the review of Mr. Edwards, published in a note to the decision, wherein the construction of this honorable court is called in question.

We will further call the court's attention to the case of Smith *vs.* Clark Co., and ask its candid perusal, not only of Judge Napton's opinion, but also of the opinion of Judge Adams upon a motion for rehearing.

This act of 1861 was urged upon the court as not having been fully considered by the whole court at the first hearing. Judge Adams says that it was fully considered, and the conclusion announced was the conclusion of the whole court, and gives cogent reasons therefore.

See page 80, 54 Mo.

Respectfully submitted,

A. J. BAKER,
F. T. HUGHES,
For Defendant in Error.

Nov 11. 78. Not Sworn

Supreme Court of the United States.

No. 62.

THE COUNTY OF SCHUYLER

vs.

JOSEPH T. THOMAS.

Copies of Statutes and parts of Statutes cited by Counsel on the Argument, and furnished by direction of the Court.

Laws of Missouri, 1856–'57, *page* 94.

AN ACT to incorporate the Alexandria and Bloomfield Railroad Company.

Be it enacted by the General Assembly of the State of Missouri, as follows: That James Cowgill, Robert E. Hill, Wm. C. Young, A. Maxwell, De Kalb Musgrave, Robert McKee, Thomas C. Rutherford, Francis Smith, Sam. Jas. Fletcher, Willis Curd, Joseph J. Benning, and Reynolds Bane, of the county of Clark, and all such persons as may hereafter become stockholders in the said company, shall be, and they are hereby, created a body corporate and politic, in fact and in name, by the name and style of the "Alexandria and Bloomfield Railroad Company," and by the same title the stockholders shall be in perpetual succession, and be able to sue and be sued, to plead and be impleaded, in all courts of record and elsewhere, and to purchase, receive, have, hold, and enjoy, to themselves and to their successors, lands, tenements, and hereditaments, goods, chattels, and all estates, real, personal, and mixed, of what kind or quality soever, and the same, from time to time, to sell, mortgage, grant, alien, and convey, and to make dividends of such portions

of the profits as they may deem proper: and also to make and to have a common seal, and the same to alter or renew at pleasure, and also to ordain, establish, and put in execution such by-laws, ordinances, and regulations as shall be necessary and convenient for the government of said corporation, not being contrary or repugnant to the Constitution and laws of the United States and of the State of Missouri: and generally to do all and singular the matters and things which to them it shall lawfully appertain to do for the well-being of said corporation, and the due management and ordering of the affairs of the same: *Provided always*, That it shall not be lawful for the said corporation to deal or use or employ any part of the stock, funds, or money in buying or selling any wares or merchandise in the way of traffic, or in banking or brokering operations.

SEC. 2. The capital stock of said company shall be two millions of dollars, divided into twenty thousand shares of one hundred dollars each, and it shall be lawful for said corporation, when and so soon as in the opinion of the individuals named in the foregoing section a sufficient amount of stock shall have been taken for that purpose, to commence and carry on their said proper business and railroad operations under the privileges and conditions herein granted.

SEC. 3. That said company are hereby authorized and empowered to cause books for the subscription of stock to be opened at such times and places as they may deem most conducive to the attainment of the stock required.

SEC. 4. So soon as one thousand shares of the stock shall be subscribed, the directors shall cause an election to be held for nine directors, at such time and place as they may appoint, and give notice of the same in one or more newspapers published in the State.

SEC. 5. An election for nine directors shall be held on the first Monday in May in each year, and if not held on that day, at any other time the directors may designate. The election shall be held under the supervision of one or more stockholders, and the persons receiving the highest number of votes shall be elected, and continue in office until their successors shall be qualified.

Every stockholder shall be entitled to one vote for each share held by him, and he may vote by proxy. Soon after the election the directors shall meet and elect one of their number president, who shall hold his office for the term for

which he was elected director and until his successor be qualified.

SEC. 6. The directors shall appoint agents, clerks, engineers, superintendents, and other officers and servants for said company; shall keep a journal of their proceedings; shall cause correct books and accounts to be kept; they may determine by by-laws what number of directors shall constitute a quorum, and may appoint committees, and fill all offices under said company; they shall fix the salaries of the President and the officers and agents, but no director shall receive any compensation for his services as such; they may take security from officers and agents, and may adopt such measures and do such acts as will be best calculated to promote the prosperity and usefulness of said company.

SEC. 7. The directors shall make and advertise calls for the payment of capital stock, at such times and in such manner as they may deem proper; and if any stockholder shall fail to pay such requisition within fifteen days after the time appointed, said company may recover the same, with interest, or, if not paid, may declare the stock forfeited and sell the same, and no delinquent stockholder shall vote in said company.

SEC. 8. Said company shall have full power to survey, mark, locate and construct a railroad from the city of Alexandria, in the county of Clark, *in the direction of Bloomfield*, in the State of Iowa, to such a point on the northern boundary line of the State of Missouri as shall be agreed upon by said company and a company authorized on the part of the State of Iowa to construct a railroad to intersect the road authorized to be constructed by the provisions of this act at the most practicable point on said State line, and for that purpose may hold a strip of land not exceeding one hundred feet wide, and may hold sufficient land for the construction of depots, warehouses, and water stations, and may select such route as may be deemed most advantageous.

SEC. 9. The stock of said company shall be exempt from taxation for the period of twenty years after its completion.

SEC. 10. Said company shall in all things be subject to the same restrictions and entitled to all the privileges, rights, and immunities which are granted to the North Missouri Railroad Company by an act entitled "An act to incorporate the North Missouri Railroad Company," approved

March 31, 1851, so far as the same are applicable to the company hereby created, as fully and completely as if the same were herein reënacted.

SEC. 11. Said company shall commence the construction of said road within ten years after the passage of this act, and complete the same within ten years thereafter.

SEC. 12. The stockholders of said company shall be, and are hereby, exempted from the effects of sections nine and ten of the act entitled "An act to authorize the formation of railroad associations, and to regulate the same," approved December 13, 1855.

This act to take effect from and after its passage.

Approved February 9, 1857.

AN ACT to incorporate the North Missouri Railroad Company.

Laws of Missouri, 1851, page 485:

"SEC. 7. Said company shall have full power to survey, mark, locate, and construct a railroad from the city of St. Charles, in the county of St. Charles, passing up the divide between the tributaries of the Mississippi and Missouri rivers, as near as may be to the northern boundary line of this State, with a view that the same may be hereafter continued northwardly into the State of Iowa, in the direction of Fort Des Moines, in that State; and for that purpose may hold a strip of land not exceeding one hundred feet in width, with as many set of tracks as the said presidents and directors may deem necessary: *Provided*, That in passing hills or valleys the said company are authorized to extend said width in order to effect said object, and may also hold sufficient land for the erection of depots, warehouses, and water stations, and may extend branch railroads to any point in any of the counties through which said road may be located."

Page 486:

"SEC. 14. It shall be lawful for the county court of any county in which any part of the route of said railroad may be to subscribe to the stock of said company; and it may invest its funds in the stock of said company, and issue the bonds of such county to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interests and credit of the county. Such county court may appoint

an agent to represent the county, vote for it and receive its dividends; and (any) incorporated city, town, or incorporated company may subscribe to the stock to said railroad company, and appoint an agent to represent its interests, give its vote and receive its demands, (dividends,) and may take proper steps to guard and protect the interests in (of) such city, town, or corporation."

Constitution of 1865.

"CONSTITUTION MO., ART. 11, SEC. 14.—The General Assembly shall not authorize any county, city, or town to become a stockholder in or to loan its credit to any company, association, or corporation, unless *two-thirds of the qualified voters of such county*, city, or town, at a regular or special election to be held therein, shall assent thereto." (Wagner's Statutes, Ed. 1872, p. 43.)

"AN ACT to authorize the formation of railroad associations and to regulate the same."

Laws of Missouri, 1853, page 133:

"SEC. 23. The directors of any company under this [act] may, *by a vote of two-thirds of their whole number*, at any time alter or change the route or any part of the route of their road, if it shall appear to them that the line can be improved thereby: and they shall make and file in the clerk's office of the proper county a survey, map, and certificate of such alteration or change, and shall have the same right and power to acquire title to any lands required for the purposes of the company, in such altered or changed route, as if the road had been located there in the first instance: and no such alteration shall be made in any city or town, after the road shall have been constructed, unless the same is sanctioned by a vote of two-thirds of the common council of said city, or trustees of said town: and in case of any alteration made in the route of any railroad after the company has commenced grading, compensation shall be made to all persons for injury so done to any lands that may have been donated to the company. All the provisions of this act relative to the first location and to acquiring title to land, shall apply to every such new or altered portion of the route."

Page 135:

"SEC. 29. It shall be lawful for the county court of any county and the city council of any city to subscribe to the capital stock of any railroad company duly organized, under this or any other act, in this State; and the county court or city council subscribing or proposing to subscribe to such capital stock may, for information, cause an election to be held to ascertain the sense of the taxpayers of such county or such city as to such subscription, and as to whether the same shall be paid by issues of county or city bonds, as the case may be, or by taxation."

Page 143:

"SEC. 55. The legislature may at any time alter or amend this act, but such alteration or amendment shall not impair the rights of companies previously organized, or take away or impair any remedy given against any such corporation, its stockholders or officers, for any liability which shall have been previously incurred.

"SEC. 56. All existing railroad corporations within this State, *and such as now or may be hereafter chartered*, shall respectively have and possess all the powers and privileges contained in this act; and they shall be subject to all the duties, liabilities and provisions not inconsistent with the provisions of their charter, contained in sections 9, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, and 53 of this act."

AN ACT supplemental to an act entitled "An act to authorize the formation of railroad associations, and to regulate the same." Approved, December 13, 1855.

Laws of Missouri, 1860–61, page 60:

Be it enacted by the General Assembly of the State of Missouri, as follows: That whenever the county court of any county in this State, or the city council of any city, shall be satisfied that the citizens of said county or city desire to subscribe to the capital stock of any railroad company, it shall be the duty of such county court or city council to order an election to be held in the said county or city, in accordance with the provisions of the 30th section

of the above recited act, giving at least thirty days' notice of the time and place of holding such election, by written or printed handbills, posted up in each election precinct in such county or city, by the sheriff or marshal thereof: and if a majority of all the resident voters of said county or city who are qualified to vote for county and State officers, and who shall vote at such election, shall cast their votes for subscribing said stock, then the county court or city council shall subscribe such stock to said road.

SEC. 2. It shall not be lawful for the county court of any county to subscribe to the capital stock of any railroad company, unless the same has been voted for by a majority of the resident voters, who shall vote at such election under the provisions of this act.

SEC. 3. No person shall be exempt from the payment of his *pro rata* share of any tax levied by the county court or city council, because such person shall hold stock in such company.

This act shall take effect and be in force from and after its passage.

Approved, March 23, 1861.

General Statutes of Missouri, 1865.

"Of railroad companies," page 337:

"SEC. 13. The directors of any company under this charter may, by a vote of two-thirds of their whole number, at any time, change the road-bed or road line, or any part thereof, for the purpose of shortening the line or to overcome natural objections thereto; but nothing in this section shall authorize said company to change the general route or terminus of said road or any part thereof." Page 343, section 47.

"The legislature may, at any time, alter or amend this chapter, but such alteration or amendment shall not impair the rights of companies previously organized, or take away or impair any remedy given against any such corporation, its stockholders or officers, for any liability which shall have been previously incurred."

"SEC. 48. All existing railroad corporations within this State, and such as may be hereafter chartered or formed, shall, respectively, have and possess all the powers and privileges contained in this chapter; and they shall be sub-

ject to all the duties, liabilities and provisions, not inconsistent with the provisions of their charter, herein contained."

Laws of Missouri, 1865–6, page 222:

AN ACT to amend an act entitled "An act to incorporate the Alexandria and Bloomfield Railroad Company," approved February 9, 1857, authorizing said company to change the incorporate name, also authorizing said company to extend said road from a point at or near Luray, in Clark county, Missouri, to Nebraska City, in Nebraska Territory, by way of or near Rockport, in Atchison county, Missouri, and also authorizing said company to adopt all or any of the sections of this act, the same to be binding on said railroad company.

Be it enacted by the General Assembly of the State of Missouri as follows: That the Alexandria and Bloomfield Railroad Company may change the corporate name of said company to that of the Alexandria and the Nebraska City Railroad.

SEC. 2. That said railroad company may extend said road from a point at or near Luray, in Clark county, Missouri, to Nebraska City, in Nebraska Territory, on the most practicable and direct route, by way of or near Rockport, in Atchison county, Missouri.

SEC. 3. That the said company may consolidate said road, or make any running arrangement with any railroad now constructed or that may be hereafter constructed in the State of Missouri, such as may be mutually agreed upon by the proper contracting parties connected with said railroad or roads.

SEC. 4. That the whole of this act, or any section thereof, as shall be adopted by the board of directors of the Alexandria and Bloomfield Railroad Company, at any meeting of said board called for that purpose by the order of the board or a majority of said board, the secretary having given thirty days' previous notice in writing to each director, stating fully the object of said meeting, shall be in force from and after its adoption.

SEC. 5. This act to take effect and be in force from and after its passage.

Approved February 19, 1866.

Laws of Missouri 1869, page 74:

AN ACT to amend section thirteen of chapter sixty-three of the general statutes of 1865 relating to railroad companies.

Be it enacted by the General Assembly of the State of Missouri as follows: That section thirteen of chapter sixty-three of

the general statutes of 1865, relating to railroad companies, be, and the same is hereby, amended so as to read and be in force and effect as follows: SEC. 13. That the directors of any company organized under the provisions of this chapter may, by a vote of two-thirds of their whole number, at any time change their road-bed, or road-line, or any part thereof, for the purpose of shortening the line, to overcome natural objections thereto, or to secure economy in its construction, and when the capital stock of such company subscribed and the amount paid thereon shall be equal to or exceed the amount per mile, including the proposed extension, which by the third section of this chapter is required to be subscribed and paid before filing the original articles of association, then such company may, by a like vote of its directors, at any time extend their line or road-bed from either terminus named in their original charter to such other point as shall be named in such proceeding of such company. Such proceedings in relation to the extension of their road shall be entered on the records of the company, and a copy of such proceedings, with an affidavit, as required by the third section of said chapter, endorsed thereon, shall be filed in the office of the Secretary of State, and by him recorded and certified as the original articles of association. But nothing contained in this act shall be construed as to authorize such company to change the general route of their line or road-bed, or to avoid running their road through any point named in the original articles of association, or either terminus named therein, or to change the last established terminus, except by extension of their road as aforesaid.

SEC. 2. This act shall take effect and be in force from and after its passage.

Approved March 4, 1869.